UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEWARK EDUCATION WORKERS CAUCUS and NATURAL RESOURCES DEFENSE COUNCIL, INC.,	**CIVIL ACTION NUMBER: 2:18-cv-11025-ES-CLW**
Plaintiffs,	**PRELIMINARY INJUNCTION HEARING**
v.	
CITY OF NEWARK, NEWARK DEPARTMENT OF WATER AND SEWER UTILITIES, RAS BARAKA, ANDREA ADEBOWALE and CATHERINE R. McCABE,	**Pages 1 - 186**
Defendants.	

Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07101
Friday, August 16, 2019
Commencing at 10:31

B E F O R E: **THE HONORABLE ESTHER SALAS, UNITED STATES DISTRICT JUDGE**

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

Mary Jo Monteleone, Official Court Reporter
maryjomonteleone@gmail.com
(973) 580-5262

A P P E A R A N C E S:

NATURAL RESOURCES DEFENSE COUNCIL
BY: SARA E. IMPERIALE, ESQUIRE
40 W. 20th Street, 11th Floor
New York, NY 10011
(212) 727-2700
simperiale@nrdc.org
dcarpenter-gold@nrdc.org
For the Plaintiffs

NATURAL RESOURCES DEFENSE COUNCIL.
BY: CLAIRE WOODS, ESQUIRE
JERRY EPSTEIN, ESQUIRE
MICHELLE NEWMAN, ESQUIRE
NANCY S. MARKS, ESQUIRE
MARGARET HSIEH, ESQUIRE
111 Sutter Street, 21st Floor
San Francisco, California 94104
(415) 875-6100
cwoods@nrdc.org
jepstein@nrdc.org
For the Plaintiffs

BEVERIDGE & DIAMOND, PC
BY: ERIC L. KLEIN, ESQUIRE
15 Walnut Street, Suite 400
Wellesley, Massachusetts 02481-2133
(202) 789-6016
eklein@bdlaw.com
For the Defendants, City of Newark and Newark Department of Water and Sewer Utilities

BEVERIDGE & DIAMOND, PC
BY: BINA R. REDDY, ESQUIRE
98 San Jacinto Boulevard, Suite 1420
Austin, Texas 78701-4296
(512) 391-8045
breddy@bdlaw.com
For the Defendants, City of Newark and Newark Department of Water and Sewer Utilities

A P P E A R A N C E S: - CONTINUED

BEVERIDGE & DIAMOND, PC
BY: ROY D. PRATHER, III, ESQUIRE
50 East Palisade Avenue
Suite 208
Englewood, NJ 07631
rprather@bdlaw.com
(410) 230-1300
For the Defendant, City of Newark and Newark Department of Water and Sewer Utilities

BEVERIDGE & DIAMOND, PC
BY: COLLIN S. GANNON, ESQUIRE
201 North Charles Street, Suite 2210
Baltimore, Maryland 21201-4150
cgannon@bdlaw.com
(410) 230-1322
For the Defendant, City of Newark and Newark Department of Water and Sewer Utilities

NEW JERSEY OFFICE OF THE ATTORNEY GENERAL
BY: KRISTEN DENGATE HEINZERLING, ESQUIRE
25 Market Street, P.O. Box 093
Trenton, NJ 08624
(609) 376-2789
kristen.heinzerling@law.njoag.gov
For the Defendant, Catherine R. McCabe, Commissioner of the New Jersey Department of Environmental Protection

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ARGUMENTS OF COUNSEL

(PROCEEDINGS held in open court before The Honorable ESTHER SALAS, United States District Judge, at 10:31 a.m.)

All right. Please be seated. We're on the record in the *Newark Education Workers Caucus, et al., v. City of Newark, et al*.

We're prepared to move forward with our closing and oral argument segment of the preliminary injunction. So let's start with plaintiffs' counsel.

MS. WOODS: Good morning, Your Honor. Claire Woods for the plaintiffs, along with Jerry Epstein, Nancy Marks, Michelle Newman, Margaret Hsieh and Sara Imperiale.

MR. KLEIN: Good morning, Your Honor. Eric Klein, Bina Reddy, Roy Prather and Collin Gannon, for the City of Newark.

MS. HEINZERLING: Good morning, Your Honor. Deputy Attorney General Kristen Heinzerling for Commissioner Catherine McCabe.

THE COURT: Good morning to all counsel.

And now I'd like to hear from the plaintiffs.

MS. WOODS: Your Honor, would you prefer to hear the abstention arguments or closing on yesterday's?

THE COURT: Closing on yesterday's, and then we'll leave the final abstention issue for argument.

ARGUMENT BY MS. WOODS:

MS. WOODS: The equities in this case cry out for

limited and targeted relief that we are seeking to protect one additional group of pregnant women and families with children six and under. There are just too many uncertainties about whether the risks of harm to the developing brains of children will abate over the next several months.

The risk of harm here massively outweighs the limited costs of the protection we're seeking.

So let's review the evidence as to the ongoing risks and uncertainties.

Both parties now acknowledge that water from the Pequannock has blended into the Wanaque, whether through partially open section gates or the pressure-regulating valves between the two service areas.

And the water quality parameter monitoring data confirms that the flow from the Wanaque to the Pequannock was not intermittent. It was ongoing for years. That's Exhibit 136 at Paragraph 48.

In the past, because of blending, orthophosphate in the levels in the Wanaque were far too low to be effective. Exhibit 136, Paragraph 45 through 50.

THE COURT: So now, I promised counsel that I would be interrupting, and I apologize for interrupting, but I really do want to make sure that this transcript and, more importantly, the issues are covered while we're addressing them.

So, Ms. Woods, there was a lot of testimony that was --

I understand that there was testimony that there were gates open, but we have testimony in the record from your own expert indicating that -- on cross-examination that the water in the Pequannock now has orthophosphate, which the water in the Wanaque has had. That's Page 72 of the transcript.

And the question by Mr. Klein: "Okay. So do you know whether they both contain orthophosphate at comparable levels?"

The answer is: "Yes, I believe they do."

And that was your own expert, Dr. Giammar.

I asked during my own questioning of Dr. Giammar, I asked him about the gates being closed and assuming that the gates were closed.

And I asked: "So if indeed the gates were closed in January of this year and now we are in August --"

The witness says: "Yup."

"Assuming now that they are drawing from the Wanaque waters -- "

"Yeah."

" -- is the danger as high as it necessarily would have been in January?"

Your witness, Dr. Giammar, said: "No. The danger is definitely lower now."

And so I go on to ask Dr. Giammar the question as to flushing, whether flushing in Wanaque would be effective. Your own witness said --

And I said: "Looking at the levels that we're talking about in Wanaque, even the isolated spikes that we have in Exhibit 83, you said flushing would be effective?"

Witness: "I believe it would because in the 10 sequential profiles that we have, you can see that, as we go out to longer samples, we actually do get to low concentrations."

Question from the Court: "So residents of Wanaque could be -- there could be notice that flushing could be effective based on these numbers? Would that not be an appropriate notice to -- "

Your witness: "Yeah."

The Court: "-- Wanaque residents how to maybe guard is also --"

Your witness: "Yeah."

"-- flushing" -- and then I go on to say: "-- flushing and making sure that they're not using the water until they've flushed appropriately?"

Then he goes on to say: "I know that it can be effective, but it has to be done right."

That's at Pages 108 and 109 of yesterday's proceeding.

We have Dr. Reiber talking about, necessarily, the effectiveness of flushing. Page is 197.

I won't go on, but Dr. Reiber also indicates that the orthophosphate, Page 216 of the transcript, goes on to say that the by -- I'm going to read --

This is Dr. Reiber: "Well, this clearly would indicate that the orthophosphate delivered at the prescribed dosage with the other water quality parameters in tow is effective.

"But my point would be basically that we have almost two identical waters now from the Pequannock and the Wanaque. There is no reason to think that the Pequannock water, if it were to enter the Wanaque, would represent a corrosion control problem."

And he goes on to explain that on Pages 216 and 217.

We have Mr. Adeem testifying that the gates were closed as of January, early January.

When we're talking about your presentation, I need you to focus on now and not -- because we're dealing with what's at issue and what's at risk now for the residents of Wanaque and not what could have been or what was happening in 2018.

There's a lot of evidence in this record right now that tells me that the orthophosphate levels have stabilized. And if the orthophosphate levels have stabilized, as the

witness has testified, and it's uncontroverted now, that that's further support that the system is working, that the orthophosphate is working, and the gates have been closed.

MS. WOODS: Your Honor, I apologize. I was laying background for how we got to where we are.

THE COURT: Okay. So let's --

MS. WOODS: And I have --

THE COURT: -- come now to where we are.

MS. WOODS: Yes.

THE COURT: How are we dealing with your own expert telling me that the harm now is lower than it would have been in January?

MS. WOODS: Your Honor, the question -- your first question about the water being the same on either side, we do not dispute that at this point. When we first filed the motion that was not the case, but at this point, we agree. It appears that the orthophosphate levels have risen on the Wanaque side.

But Dr. Reiber also agreed that "water stability could be achieved relatively quickly," and then there's a break, but "passivation of the lead service lines or the lead in brass faucets could take longer."

In short, the pipes don't recover overnight. It takes time. So even if the water is the same on both sides, the pipes need time to recover.

THE COURT: Yeah. But you have the problem of Dr. Reiber testifying that when they did their scales analysis of the pipes in question -- I think was it Hinsdale? Or was it the residents that were --

MS. WOODS: 14 Hinsdale was the one that he referenced, but that was only one. He referenced one that he said was in the blending area. But Dr. Giammar talked about 95 Pennsylvania Place, which didn't indicate passivation.

THE COURT: Yeah. But we're now talking about your own doctor telling me 6 to 12 months. And we are now in the eighth-month period of Wanaque being really isolated.

We have testimony from Mr. Adeem that there has been no reason to manually open the gates since they've been shut as of January 1, 2019.

So we haven't had a reason to open those gates manually, and they can only be opened manually. Those gates have not been opened.

That means Wanaque has been left on its own, curing on its own, dealing with its own treatment, its corrosion control treatment that they've utilized since 1997.

And the fact of the matter is that your own expert said 6 to 12 months; 6 to 12 months. We're in the eighth-month period right now. All right? And he also said that, based on these levels, flushing is effective.

So why would not notice going out to Wanaque,

flushing be an acceptable remedy under the circumstances?

MS. WOODS: Your Honor, Dr. Giammar also testified that flushing could actually significantly increase the levels that are coming out of the tap.

And Dr. Reiber gave conflicting information about how long residents should flush. He said 10 seconds. He said -- I believe he said, based on -- okay. Let's see.

Dr. Reiber contends that flushing could address the problems in the Wanaque. But Dr. Reiber didn't study how long of a flushing recommendation they should provide.

Indeed, he assumes that the lead is only coming from the fixtures in the faucets when their own studies, the sequential samplings, show that there are lead levels in the lead service lines.

And based on that assumption, he suggests that a 10-second flush would have been adequate, and he also suggests that a flushing period as little as 15 or 30 seconds.

But what happens to the residents in that scenario that have lead in their lead service line, not just in their faucets? We know that is a scenario that is happening in the Wanaque service area. And which is it? Ten seconds or 30 seconds?

THE COURT: Your own expert told me that flushing three minutes, and I think the maximum point was he was saying five when I was asking him be conservative, what do you think.

I mean, I understand that there are, again, concerns about the length of time of flushing. But your expert had it at the outside of five minutes. We've got Dr. Reiber saying somewhere in 10 seconds. I get -- and those are the two extremes.

But the reality of the situation is that we, again, cannot forget that Wanaque now has been cut off from Pequannock. No evidence to controvert Mr. Adeem on that.

We're going to get -- the defense is going to have to explain to me what happened with that evidence and not being produced. We're not going to get away from the discovery issues that this case is not going to have any more.

But I feel, based on the urgency of the current motion before me, the Court had no choice but to accept that evidence, which fully supported Mr. Adeem's assertion that those gates were closed when they were closed starting in November, ending, at the latest, early January.

Wanaque now has been treating its water without interruption, without contamination from Pequannock, since January. We're now towards the end of August. Even on your expert's own assessment, we're talking about a 6-to-12-month period, and he said flushing would be effective.

I just don't know what evidence you have to tell me that the Wanaque residents are truly in danger in light of the current state of affairs.

MS. WOODS: Your Honor, both experts agreed. Both Dr. Giammar said it could take 6 to 12 months based on his experience in other cities, including Flint. And Dr. Reiber said he didn't disagree with that estimate. That's four months from now that we're talking about where residents could still be affected.

And we're asking for relief for a very short time period, only until they figure out what's going on with the PUR filters.

That amount of time, that three months is a very real period of time for children's developing brains. A massive amount of damage can happen within three months. And the effects of lead are cumulative.

So a child who has been exposed over six months and then has three additional months of exposure, it can have a very detrimental effect. And I have cites for that -- on that for you.

So Dr. Lanphear, who didn't testify yesterday, but who submitted a declaration in the case, is one of the world's foremost experts on lead exposure to children and its health effects. He's conducted more than 40 studies on lead exposure, and he's published frequently in peer-reviewed journals.

And he explains that there are multiple studies showing harm to children at or below 15 parts per billion.

And there is a significant risk of harm from elevated lead levels in drinking water for exposure periods of even less than six months. And even 1 part per billion increase in water lead concentration would result in a 35 percent increase of lead in blood after 150 days of exposure.

Those are at Exhibit 140 at 24.

And perhaps most importantly, the adverse effects of exposure to lead accumulate over time. Again, 140 at Paragraphs 20, 41 and 48.

And that means residents in the Wanaque who have been exposed over this past six-month period are at risk because they haven't had filters all year. And they're particularly at risk now because the effects are cumulative.

And Dr. Griffiths and Dr. Hanna-Attisha, our other experts on lead, conclude the same thing.

And the defendants' experts -- expert on this health issue is not a lead expert. She hasn't conducted a single study on lead or published a single peer-reviewed study.

So the science is already there. The effects of lead over a short period of time are very real. And children's brains are very vulnerable, especially after they've had long exposure periods like they have in the Wanaque.

THE COURT: Let me ask you, Ms. Woods, because I believe testimony from both experts, Dr. Giammar was pressed, Dr. Reiber was asked, about the fact -- let me phrase it

another way -- whether any court in this nation had ordered bottled water to be delivered for exceedances at the levels in Wanaque, and both experts said no.

What are you doing with that?

MS. WOODS: Your Honor, the Wanaque isn't its own system. It's regulated as a single system with the Pequannock.

The State calculates the 90th percentile level based on the entire system. We don't break apart little areas in terms -- for purposes of calculating the 90th percentile.

So the question of -- really, the question of whether bottled water should be ordered based on a broken part of the entire regulated system, it's not the right question.

The whole service area -- the whole system is what we should be looking at.

THE COURT: Okay. I understand that the DEP and the EPA look at the whole system as one regulated system. I get that. But we also can't ignore the facts.

And the facts are that they are independent water systems. They are independent water systems that have been treating differently, for whatever reason. All right? Have been treating differently since the 1990s.

We know that, in 1997, Wanaque had been treating with the orthophosphate. We know that Wanaque right now has been and is under control, based on the testimony before the Court.

We know that Wanaque right now -- and I understand that you dispute the evidence. But I can tell you that even looking at your graph and considering the durational and the chronological evidence before the Court, it appears that we have, at least from what I've heard and what I heard from Dr. Reiber, who I found very credible, and I found his evidence and presentation to be one that was detailed, as detailed as I wanted it and needed it to be.

And he explained the science to the Court and explained what he saw in terms of the orthophosphate levels.

It's very critical evidence in my mind that we have a system that is indeed now under control and there is a trend downward in terms of the levels.

We also have a system that, quite frankly, the level exceedances have not been such that would suggest that there is anything going on with this newly-developed argument by the plaintiffs that somehow there is a problem with the corrosion control treatment in effect in Wanaque.

That is a new argument. That's never been made. There was no presentation of evidence. That was only speculation as to there being a problem with the corrosion control treatment plan of Wanaque.

And so I just -- I say to you that there isn't a lot in evidence to suggest that there is, in terms of irreparable harm, a real issue right now as far as the residents of

Wanaque are concerned.

That's my present, you know, that's my sort of overview and presentation to you in the sense of the evidence.

I gave you an opportunity to present rebuttal evidence. You all did not. And I think it's because the evidence is pretty secure now, and pretty set, that Wanaque is not, at this point, in danger of getting any additional contaminations, and we had levels that suggest that things are under control in Wanaque.

MS. WOODS: Your Honor, I think that last point is important. 15 parts per billion does not suggest that levels are under control at all.

THE COURT: But that's an action level that I'm guided by. I'm guided by what the action level is.

And I understand all along that there has been arguments that levels below 15 parts per billion are not safe. I get that.

But that is not a fight that I -- that you need to bring to me. That's a fight that needs to be brought to Washington, D.C. I cannot control the action level that currently exists at 15, and I'm guided by that by law.

So I understand. Believe me, it troubles me too. But I am guided by the law.

MS. WOODS: Your Honor, the stipulation is 14.65 to 15.65.

THE COURT: And you have an obligation --

And by the way, I do not understand that stipulation. I do not know why the parties entered into it, but you did.

But the fact of the matter is it's a stipulation in a range in which you still had the obligation to tell me that there was still dangers within -- at that 15.65 range.

I've seen some spikes. I understand isolated spikes. I think Dr. Reiber explained why isolated spikes occur. I found his explanation to be understandable, credible.

There was nothing to tell me that his explanation in terms of particles breaking off -- all of that has not been controverted.

MS. WOODS: Your Honor, but the isolated spikes, if you're having particulate lead coming out of the tap, someone is still drinking that. That does not, just --

THE COURT: Is that not the case as it --

Dr. Reiber basically said we cannot create a system that is never going to have lead in its water. In fact, as I learned yesterday, there is a certain amount of lead that is permitted in bottled water, of 5 parts per billion, which was new information as well.

I mean, there is lead that, unfortunately, all of us are exposed to. My question now, right now, is are the residents of Wanaque in any greater danger. And I don't believe you've sustained that burden, Counsel.

MS. WOODS: Your Honor, I just want to make something clear, that we're not comparing what the danger was in January or February or last year to what the danger is now. The relevant thing is whether there's danger now.

THE COURT: Right.

MS. WOODS: And the downward-trend maps that the -- or charts that the defendants showed you are based -- their downward trends are based on very few data points in June and July. Nine samples from the Wanaque in July and, I believe, 13 in June.

That data -- both experts said that you need robust data to come to conclusions.

That data is not enough to do away with the action level -- with being between 14.65 and 15.65 at the 90th percentile for the entirety of the monitoring period.

And, Your Honor, the dangers of lead at 15 parts per billion are very clear based on the written testimony of our three health experts in this case. And we didn't present that testimony yesterday, but there is a robust discussion in the papers about what lead can do to a child's brain at those levels.

And we're not talking about 5 parts per billion here. We're talking about 14 -- 14.65 to 15.65 parts per billion. That is not a system that is effectively controlling corrosion. That is what Dr. Giammar said.

And I'd just like to clear -- just make something clear, that we don't contend that water is still blending. We don't have that information. In fact, the City's own expert didn't know why the blending was happening or what the bounds of the blending were when it was happening.

We don't have that information either. But what we do know is that it was happening and that the pipes take time to recover, and that both experts agree -- agreed that it could take 6 to 12 months for that to happen.

THE COURT: Well, I believe that Dr. Reiber testified that he -- that he -- well, didn't -- he was respectfully disagreeing with your expert; that he has seen the treatment take a lot less time. That is on the record.

MS. WOODS: He did say he has seen it take less time and -- he did say he had seen it take less time, but he also said he didn't disagree with Dr. Giammar that it could take 12 months. And so that is a very important --

That is at 213:1-15.

That is a very important fact, particularly given the duration of the relief and the limited nature of the relief we're seeking.

There are still four months left before we reach that 12-month stopping point. And we are asking for very minimal relief that's dependent on the amount of time that they take to study the PUR filters.

And we really don't think that's going to take very long. We don't think it'll take longer than three months. And so that's why we're asking for such limited relief.

THE COURT: One of the things that Dr. Reiber said, and you're right, on Page 213 of the transcript, we talked about the issue of re-equilibration.

In other words, I asked for the pipes -- in my mind, for the pipes to get back to where we want them to be in light of the orthophosphate.

The witness says: "I'm not going to object strenuously to what Dr. Giammar said. I'm sure in some circumstances he's perfectly right. But I'm also saying that in other circumstances it is much quicker than that. And I believe we have some Pequannock data to demonstrate that."

And he went on, as I understand it, to look at the Pequannock data and to talk about it being implemented in May and where the numbers were. And there was a dramatic, as he said, a pretty dramatic improvement to the data.

And specifically, we're looking at Exhibit 156 during that line questioning.

And the data seemed to say that there were rapid responses to the orthophosphate treatment in Pequannock.

So if there are rapid responses to the orthophosphate treatment in Pequannock, why are we not going to think that those same rapid responses would be occurring in Wanaque?

MS. WOODS: I think there's a couple issues there. One is that the service areas are different. The water chemistry is not the same. There are different factors at play.

And I don't think that you can point -- you know, Pequannock might be one example, but you can't point to that as the only example. There are a lot of other examples that both experts mentioned where it has taken longer.

The other thing is that -- is that -- I'm sorry. Could you refer -- state the question again?

THE COURT: No. I just basically was saying that he went on to testify about the evidence showing that there has been a rapid response to the treatment of the orthophosphate in Pequannock.

And he was able to show those levels, and that was pretty strong evidence to show that just from May to where they tested in July, in that two-month period, there was quite a bit of response.

Obviously, the numbers are still deplorable --

MS. WOODS: Yes.

THE COURT: -- in Pequannock. I get that. But we are seeing the numbers come down, and there's a trending that the numbers are working.

So my question to you, if we have Dr. Reiber saying that in some -- he didn't take -- he didn't strenuously object

with Dr. Giammar, but he said, you know what, it could -- it very well may take 6 to 12, but I've seen it in less. And the Pequannock data suggests to me that it's going to be effective.

And then he pointed to very credible data to show that the treatment in Pequannock is working at a rapid rate.

And so my question to you is, how -- isn't that now, I think, instructive? Isn't it now enlightening for me to say that if we're seeing such a great response in Pequannock, why would we not be seeing just as good a response in Wanaque, a system that, quite frankly, has been under this treatment since 1997?

MS. WOODS: Your Honor, partially because of the background, because of in the blended areas the orthophosphate levels were so low because of the blending that they need time to recover. They should be treated like the Pequannock as the water is coming in.

The water -- the Pequannock water blends into the Wanaque, and so --

And I think, regarding whether the Pequannock is recovering quickly, they're -- based on the way they've separated out the data, let's remember in the last monitoring period, which ended in June -- on June 30th, the action level was 57 parts per billion.

So they're not in a good place, as Your Honor

indicated.

But even if you take their exhibit with the chart that defendants provided, the levels are still 20 -- I believe it's 27 parts per billion at the 90th percentile.

And those levels are based on very few data points. It's not a robust analysis. So there's a lot still out there to collect to know whether the treatment in the Pequannock is working.

And Commissioner McCabe herself said, in a conference over the weekend, in a press conference, that it takes two 6-month monitoring periods to confirm that corrosion control treatment is effective.

And we're not asking for that here. We're asking for three months.

And Dr. Reiber, I don't believe -- I believe he never said he's confident that it's eight months here. He said he's seen examples where it's lower, but he also agreed that it could be higher.

And we know that in Flint it took 12 months. We know, we heard other examples where it took 12 months.

And the data that we do have, the limited data that we do have in recent months is not enough to avoid protecting these people. The cost, the burden is so low and the risks are so high that we can't base this decision on a handful of data points.

I just want to address something about flushing. And we talked about confusion. We talked about the inconsistent flushing statements by Dr. Reiber -- or Reiber, excuse me. And we talked about whether flushing could be effective. But there are a couple of other factors to think about here.

As the defendants noted yesterday, there's mass confusion in Newark right now. Yet another flushing recommendation would add to that confusion substantially.

In the past, over the last two years, Newark has advised residents to flush their tap for 15 seconds. They've advised residents to flush their tap for 30 seconds. They've advised residents to flush their tap for two minutes. And they've advised residents to flush their tap for five minutes.

In October 2018, residents were told to avoid flushing altogether because it could make the problem worse as lead particulates break off into the water.

And now, residents in the Pequannock are being told to flush again, this time for five minutes.

It's confusing. Anyone would be confused with all of that inconsistent direction.

And at the same time, this confusion is compounded by the fact that residents in the Wanaque service area continue to receive promises from the City that their water is unaffected. You can take a look at Exhibit 21 for those types of promises.

The City also sends mailers to residents saying that the problem is limited to residents in the Pequannock service area with lead service lines.

If I were a parent in the Wanaque service area, I would want to know that there is a risk to my family. And the mailings that say that residents -- there's only a problem in the Pequannock is just wrong, even if it's at 14.65 parts per billion.

The other issue with that is that the statements say that the problem is limited to lead service lines, and we also know that that's not true.

And because of these steady drumbeats over the past two years, Wanaque residents simply won't know that they urgently need to take protective measures to protect their families, even with the recommendation from the City. They've had too much conflicting information.

And when a mom has been told that her area is unaffected for two years, and her baby wakes up crying in the middle of the night, she is not going to flush her tap for five minutes before she prepares baby formula. It's not going to happen. Why would she? She's been assured that her water is safe for two years.

So there's an extreme amount of confusion that will very seriously undermine a flushing recommendation, if there is one.

And then another point on flushing is that we can't forget that residents pay for their water. Residents in Newark pay for their water. And more water is more money.

In a City where many residents struggle to pay their bills, a requirement to flush for five minutes is -- should be considered.

A flushing recommendation would shift the burden of Newark's lengthy Safe Drinking Water Act violations to individual residents, and Newark residents have carried enough of that burden. They should not be asked for more.

I'd like to clarify a few points that seem to have caused some confusion yesterday, at yesterday's hearing. I know we -- I've already talked about this, but I want to put -- I want to state clearly that Wanaque and the Pequannock are regulated as a single system under the Lead and Copper Rule, and Dr. Reiber agreed to that at 226:6-8. And whether we use different, informal terminology to refer to one side or the other, as a legal matter these two service areas are one system.

And the statute, the Safe Drinking Water Act statute's requirements apply to owners and operators of a public water system.

Yesterday, Mr. Adeem confirmed that he manages the daily maintenance operations of the Wanaque service area, manages the operations, and that the City owns the

distribution system on both sides. That's 238:18-239:11. So if something breaks, the City has the responsibility to fix it, including the valves.

And under the City's own municipal code, Newark retains management responsibility for the entire water system.

And this makes sense. The Safe Drinking Water Act regulates public water systems. If a water system could evade responsibility to provide safe water to its customers simply by outsourcing the management of its facilities, it would gut the public health protections of the statute.

And at Your Honor's direction, the parties really focused in for this hearing on the likelihood of irreparable harm, which we contend is substantial. But it's important to note that these high lead levels and the years that it's taking to address them have not come about on their own. There are violations of the Lead and Copper Rule that have led to these levels and to the duration of these levels.

We have shown that the City Defendants committed seven violations of the Safe Drinking Water Act, ranging from failure to adequately sample homes, the highest priority homes, to failing to have a complete list of the lead service lines within the system and more. That's ECF Number 143 at 31 to 47.

We spent Pages 31 to 47 in our opening February brief talking about the violations. We went step-by-step through

each one, and for the majority of them the City didn't even respond to our factual allegations. They didn't present a single piece of factual evidence to rebut the demonstration of likelihood of success on most of those violations. And these violations directly relate to what is happening right now.

The fact that they don't have a lead service line inventory that is complete, which Commissioner McCabe confirmed in public statements this weekend, is entirely problematic. Once they have the inventory, they can start the replacement.

As soon as someone gets a replacement, they're on their way towards protection. And if that had happened when it was supposed to happen, then many residents would be in a different place right now.

We're talking about a year-long delay. That's not semantics. That's potentially thousands of people that could have homes without lead service lines, if they had met their burden -- their obligations.

Another violation that directly relates to the duration of these violations is the sampling violations that we've alleged.

Newark has admitted that they weren't collecting a sufficient number of Tier 1 sites in 2017. And because of that, the problems, the lead levels were masked even before 2017, when Newark wasn't collecting sufficient Tier 1 sites.

And by the way, CDM Smith in their report agrees that the reason why the lead levels were not high before 2017 is because there could have been inadequacies in the City's sampling.

And so we know that the facts that they weren't collecting sufficient Tier 1 sites suppresses the lead levels -- it suppressed the lead levels. It kept them from detecting the problem. And that's a blind eye.

Because they weren't looking closely, they weren't doing what they were supposed to be doing. They were weren't doing what the regulations required. And because of that, they didn't detect the problem.

So that violation also relates directly to why we're experiencing problems still today. If they had known earlier, they would have fixed it earlier.

And to be clear, they should have known earlier based on what they were required to do under the law.

THE COURT: Ms. Woods, what do you make of the testimony by both experts, but focusing in on Dr. Reiber's testimony, that there -- I believe it was 2015, over 1,000 cities and municipalities in the United States have tested over 15 parts per billion and, you know, there haven't been the remedies that you seek issued in those thousand cases? What do I do with that?

MS. WOODS: Well, Your Honor, there was also evidence

that was submitted that said if you look at cities that are of a similar size to Newark, there were only nine other cities across the entire country that have exceeded 15 parts per billion.

And so, we're not talking about small water systems of 5,000 people that don't have enough staff to manage their plants. We're talking about a major U.S. city. And there are only nine other instances of that.

Additionally, there is a controversy here and now. We don't know what's going on with those other systems. One, we don't know if that data is current; two, we don't know what's going on with the other systems. They could have no violations. We really don't know. The facts are not before us.

We have the facts before us today about Newark's violations and Newark's lead levels, and that's what we should focus on here. And that's what we ask Your Honor to focus on here.

This case was filed about the facts in Newark, not about other water systems. We're not asking Your Honor to make a policy judgment about other water systems. This is about Newark.

THE COURT: But again, when we are talking about the exceedance levels that we're talking about in Wanaque -- and I get that you're saying they are one regulated system, but for

purposes of the issue before me, I cannot look away from the fact that they are two water systems independently being run. And that one has seemed to be -- has been under control, at least the evidence is suggesting that the -- blending is no longer occurring.

There is no evidence of a problem with the corrosion treatment plan that has been in place in Wanaque since 1997. And I have now orthophosphate levels that are showing stabilization.

What am I doing with the exceedance levels in Wanaque when we talk about the remedy that you seek?

Is it not setting a new precedent when we're talking about the exceedance levels of 14.65 to 15.65 to then roll out a bottled water program for those levels or those exceedance levels? You don't think that's creating a precedent?

MS. WOODS: Your Honor, we should focus on what is happening in Newark and what the facts are in Newark.

We don't know what the facts are that support the exceedances in other systems. We don't have that information in front of us. We don't know if they had sampling violations. We don't know if they failed to treat their water with corrosion.

And here we do know. We have alleged them. Your Honor will review the evidence that was submitted on likelihood of success. And we do know. We have proven that

these violations exist for Newark.

And so, when you're talking about ordering bottled water for Newark versus for these other systems, that's an important distinction.

The fact that there were violations here that led to this problem is a consideration. If there are no violations in these other towns, then it's not -- it's factually distinguishable.

And, Your Honor, I just want to be -- also be clear about something else. We're not starting afresh in terms of precedent. We're not starting afresh ordering bottled water for a system that's at 15 parts per billion.

We're simply expanding what has already been ordered for the other part of the City. And the existing bottled water program would simply be expanded to the Wanaque service area in a narrow fashion to target the most at risk. Because there is a risk here.

Even if you agree, and we don't dispute at this point -- we don't dispute that the gates were closed. That doesn't mean that the problem is -- we don't dispute the gates were closed and we don't dispute at this time that the levels of orthophosphate are now similar on both sides.

What we do dispute is that corrosion control treatment is effective at this point because the pipes have not been fully coated. They have not had enough time.

And Dr. Reiber didn't say otherwise. He didn't say that it's not possible that it could take 12 months. And his analysis that it is based on -- his analysis that things are getting better doesn't mean they're still bad.

His analysis that things are getting better is based on limited data points. We need -- we would need more data in order to -- in order to confirm that residents in this area are not at risk.

Right now the data, the 90th percentile levels for the six month monitoring period show the opposite, above -- at the action level; 14.65 to 15.65.

And I would like to make a point, just one point about cost. I know I talked a lot about our relief is targeted, and Mr. Shefftz talked about how the relief that we're asking for is only about $270,000. That is a modest cost compared to the risks that the residents in this area face, especially because the relief will be on a temporary basis.

And that un-rebutted testimony shows that residents can be protected for $270,000 for a three-month period.

And according to the World Health Organization, mitigating lead exposure in children pays for itself many times over. That's Exhibit 109.

For every one dollar spent to reduce lead hazards, there's a benefit of $17 to $220.

According to the American Academy of Pediatrics, this cost benefit ratio is better than that for vaccines, which have long been described as the single most cost beneficial medical or public health intervention. That's ECF 151-2.

So the monetized benefits of abating exposure to lead are in the literature. ECF Number 140 at 38.

300 -- $270,000 is a modest sum compared to the great risk of harm and the benefit of abating exposure.

Your Honor, Mr. Adeem testified yesterday that providing bottled water would be like yelling fire in a crowded theater. And we believe there is smoke in that theater.

The City and its experts have no idea how long the blending occurred or even where it occurred. 199:20-24, 202:20-22.

The City's experts can't even explain the spike in lead levels in 2019. That's 235:2-3.

And nobody told you that the pipes will repassivate within the next three months. Dr. Reiber said they could, but nobody told you that they would.

And on the other side, costs may be even lower than the undisputed $270,000 figure you heard because companies are coming forward to donate water.

So are we really going to play roulette with the developing brains of infants and small children to avoid

spending $2 or $300,000, an investment that's not just humane, but will actually save the taxpayers millions of dollars in avoided healthcare costs, educational intervention and all of the other resources that will be needed to help these children if they're left unprotected.

Here, the data are clear and the defendants admit that the lead levels in Wanaque fall around 15 parts per billion -- the 15 parts per billion action level for the last monitoring period. And even so, there were many spikes, which people ingest.

Levels around 54 -- sorry -- 454, 242, 188.8, 72.7 -- these are levels from homes in the Wanaque over the last six months.

I'm sure that many of us are sitting here today thinking we wouldn't want anyone in our families to drink that water. And we don't think that residents in the Wanaque should have to either.

Governor Murphy said earlier this week that water is a right and all residents in Wanaque, particularly pregnant women and children, for which the risks are most pronounced, have that right.

I have nothing else, Your Honor, but if you have questions for me, I would be happy to answer them.

THE COURT: No, I think you've answered all my questions. And what I'd like to do is obviously have you

respond to the abstention issue once counsel has made it in his closing or her closing. I don't know who is closing on the other side. When counsel has made those arguments, I think it's best for me to hear you respond to the abstention issues, if you wouldn't mind waiting to do that.

MS. WOODS: Yes, we agree, Your Honor. And my co-counsel, Jerry Epstein, will be providing that argument.

THE COURT: Wonderful. Thank you.

MS. WOODS: Thank you.

THE COURT: All right.

Mr. Klein.

MR. KLEIN: Thank you, Your Honor.

ARGUMENT BY MR. KLEIN

MR. KLEIN: Good morning.

THE COURT: Good morning, sir.

MR. KLEIN: I'd like to make three points on irreparable harm. After that, I am prepared to summarize our case and our evidence and argue it. But I would also be willing to let the Court ask its questions, if that would be more useful.

THE COURT: I may have some questions and I may find myself interrupting you, Mr. Klein, so I apologize in advance.

MR. KLEIN: I welcome it.

So the three points I want to make are these: NRDC counsel spent some time in her argument just now saying, well,

there was some dispute among the experts about exactly how much time it would take to heal the pipes in the Wanaque, whether it's 6 months or 8 months or 12 months.

I want to be clear that Dr. Reiber's testimony was that there's nothing to heal, they're already healed.

He did engage in colloquy with the Court about how fast orthophosphate can work, but the heart of his testimony was that there's no need for healing in the Wanaque, that it's already functioning properly there.

And I would direct the Court to the transcript Page 212 at Lines 20 and 21. But really he offered that opinion throughout his testimony. That is his opinion, that it's not going to take 6 months or 12 months; that it's already working now.

THE COURT: But then how do we account for the spikes, which there have been spikes, and I understand they're individual spikes, but they are alarming and concerning when we're talking about the levels of those spikes?

MR. KLEIN: Dr. Reiber addressed that too, Your Honor. And his testimony to the Court was, that happens in systems with lead service lines. And that it is -- Your Honor made this point a few minutes ago, that it is an irreducible component of having a water system that relies on lead service lines.

And it is not possible to completely eliminate spikes

of lead even in a healthy, functioning system. As we discussed yesterday, we could be having this exact same debate but talking about New York City with its 9 or 10 million people. Plaintiffs' counsel could find lots of spikes in New York City too, because that's just how this is. And it isn't possible to completely reduce them.

And if those spikes that are to be expected and cannot be eliminated are a reason that bottled water should be delivered, then we all need bottled water, at least the people who live in systems like Newark and New York City and other primarily East Coast cities that have lead service lines.

So, no one wants to minimize the seriousness of a spike of lead. No one wants to drink it. But that's not the question before the Court.

The question before the Court is what should be done, and that question really translates to what can be done. And Dr. Reiber's point of view was that bottled water delivery is an inexpensive and ineffective way to handle that circumstance, the circumstance that cities that rely on lead service lines have occasional spikes in lead. He delivered that testimony clearly. And I want to speak to that in just a moment.

The second point I want to raise for the Court is a shorter one.

NRDC counsel said a couple of times the data that

shows a downward trend in the Wanaque is based on just a few samples, just 9 samples or 12 samples. That's factually inaccurate.

And in fact, Mr. Gannon, is it possible for us to have Exhibit 155 on the screen?

Exhibit 155 is what Dr. Reiber showed the Court yesterday to illustrate the downward trend. The third bar to the right, which is the lowest one, is not based on 9 samples or 12 samples. It's based on 72 samples. That's why Dr. Reiber did it that way. Because he wanted to have, he wanted to disaggregate the six month data into three chunks to show what direction those lead levels are moving. There was more than enough samples there to get three disaggregated chunks of data, each of which had more than enough samples to tell a reliable story.

THE COURT: Is 72 samples a low amount of samples?

MR. KLEIN: No. And here is now I would answer that, Your Honor.

The Lead and Copper Rule itself actually tells you how many samples do you need to take, City, based on your size. And under standard LCR monitoring, a city of, I believe it's 10,000 to 100,000, needs 60 per monitoring period.

Wanaque has a population of around 75,000. If Wanaque was a separate system, was Wanaque City, a few miles down the road, the Lead and Copper Rule would only require

them to take 60 samples, all tolled, in the six month monitoring period.

Well here, because we have a situation and people are calling in requests for lead sampling, the number of samples just on the Wanaque side of the City was in the hundreds in that period, not 60. And it was enough that just since May there has been 72 samples in the Wanaque. Most of them were zero.

But the 90th percentile there was based on 72 samples and it is 8.8 parts per billion. It's not based on just a few samples, 9 or 12. And that was factually inaccurate.

The last point I want to make before I sort of offer myself to answer questions or to summarize my evidence is this. The one thing we didn't hear from NRDC counsel just a moment ago, is what, to my mind, is the most important consideration before this Court.

NRDC counsel said what's $2 or $300,000 if you could really help keep kids healthy. And if that were really all that's at stake, it's impossible to disagree. The problem is, that's not what's at stake.

You heard testimony from both experts yesterday that delivering bottled water by a Court order in Flint had the effect of wrecking public trust in the water.

You heard Dr. Giammar, NRDC's lawyer, volunteer to Your Honor, that when the Court ordered it in Flint, people

took that as a signal that said this water shouldn't be touched. I'm not going to bathe in it. I'm not going to use my washing machine with it. I won't brush my teeth. I won't drink it. And they just stopped using it. That was the plaintiffs' expert and, of course, Dr. Reiber agreed.

And there's no question that the people of Newark are not different than the people of Flint. That is a risk that this Court has to consider.

That if the Court says, People of Wanaque, I'm ordering you to be delivered bottled water, that what the Court is actually doing is wrecking the community's trust in their water with what Dr. Reiber says is unnecessary to do so. He thinks that the water there is fine and he has a great deal of experience.

So to use the precautionary principle here and say why not? Why not? It's not the proper application of the cautionary principle because this bottled water order would come with a terrible cost. And that cost, which was not accounted for by the plaintiffs' cost expert, as he admitted, is both a human one and a sort of a public health one.

On a human side, there's just something tragic about the idea that people would be told -- would come to think they couldn't trust their water, unnecessarily.

We read stories constantly about the people in Flint who don't drink and don't use the water still, years after

it's been fixed. That's tragic.

But putting aside that, it's also a public health problem because when you stop using your water, your particular home's plumbing becomes at risk for worse lead problems. If you stop using the water, you stop getting the orthophosphate in your own pipes.

THE COURT: But what are you doing with Dr. Giammar's testimony that basically the amount of water we're talking about here would not impact -- when we look at the gallons per person that is utilized, that this would be a miniscule amount of water compared to the daily usage of citizens in Wanaque.

MR. KLEIN: Dr. Giammar's testimony on that point was rebutted by Dr. Giammar. He said well, it is -- that's assuming that you're only talking about water consumption. But in Flint, that is not what happened. People didn't distinguish between drinking and bathing and cooking and washing and teeth brushing.

They heard the water was toxic and they stopped using it. That wasn't Dr. Reiber. Dr. Giammar said that.

THE COURT: Let me ask you, the parties stipulated to 14.65 and 15.65. Clearly, these are numbers that are problematic in the sense that we're running very close to an action level here at 14.65. What is the City doing for the citizens of Wanaque to alleviate concern, to advise them or give them notice as to issues of flushing? What is the City

proposing to do for the citizens of Wanaque?

MR. KLEIN: Well, the City has already advised flushing. That's been advice for a long time.

THE COURT: But it's been inconsistent. What are we doing -- we now have testimony from Dr. Giammar, I asked him straight out, with the levels that we're talking about, the levels that have been stipulated to, what are you recommending?

And Dr. Giammar said, he was a little uncomfortable without more information giving me a response, but when it was all said and done, I think he said five minutes would be a comfort level for Dr. Giammar.

Dr. Reiber disagreed. Dr. Reiber went from 10 to 30 seconds.

And, you know, there needs to be -- and I assume the EPA and the DEP are going to weigh in here, but there needs to be a consistent message finally sent.

What is the consistent message? What can we say? And how do we then -- if it is five minutes of flushing, what are we doing to Ms. Woods's point that these residents, who are -- many of them are struggling to get by on a daily basis -- to tell them to now assume an additional cost for water; is that fair? Is that now not putting more on residents who are already stressed, already given inconsistent statements and messages? Don't know what to do and now, by the way, run your

water for five minutes and deal with your added water bill monthly.

Mr. Klein, what are we doing for the citizens of Wanaque?

MR. KLEIN: I would like to offer three answers to that, if I can.

The first is that I hear and I promise you that my client hears the Court's concern about the people of Newark. There is no dispute in this case about whose interests are front and center and who needs to be protected.

And in this case, since the beginning, both sides have been making their arguments based on what is best for the people of Newark. And I don't -- I'd like to think that no one would dispute that, on either side.

The second point is, I would like to push back a little bit on the premise of Your Honor's question, which is what are we doing?

Dr. Reiber's core testimony was that in the Wanaque system we don't need to be doing anything. It's a healthy system. That's what he thinks, and that's what he told the Court.

Now, you can have policy questions about how to manage public comfort and whether prophylactic measures might be something to consider. But if you're talking about what's necessary, Dr. Reiber told Your Honor nothing is necessary,

this system is functional, it's working.

And the third thing I would like to say is Your Honor expressed concern about consistent messages. I greatly share that concern and Newark does too. And in fact, that is at the heart of what we're arguing here, both on this preliminary injunction and with what we're going to talk about with abstention in just a moment.

Because what does it mean for consistency of message if the EPA recommends bottled water in Pequannock and then the Court orders it in Wanaque and says we're just going to do it for a couple months and then maybe we won't need it anymore; what does it mean when, in general, DEP and EPA and Newark speak to what they think the public needs to hear and then this Court hears injunction arguments about how the message should be different?

That's exactly the problem. And we are terribly concerned that an order of bottled water in the Wanaque, particularly if it's only meant to last three months and it's meant to apply just to pregnant women and children up to the age of six, but not seven, not six months and five days -- we're terribly concerned about what kind of consistency that would send. I'm afraid people would be absolutely at a loss, like unmoored by that. It's dangerous.

THE COURT: Well, let's talk a little bit about the issue of consistency. I've found -- and let me choose my

words wisely here.

I was a little troubled on one end but pleasantly surprised on another end with Mr. Adeem's testimony yesterday.

Mr. Adeem basically testified that if a pregnant mother or a women that was clearly breastfeeding came to one of the distribution areas and was from Wanaque, he has instructed his people, and the executives above have instructed the individuals manning these distribution centers, to not get into, you know, an argument or a disagreement with the individual, the pregnant or breastfeeding mother. And therefore, they have been giving out bottled water to these individuals that have been showing up at the distribution center -- centers.

There is an issue of whether they're following a consistent message, whether they're following a consistent plan. And I appreciate what Mr. Adeem testified to in the sense that he was being, in my opinion, extremely honest and extremely credible as to the City struggling with its own issues of wanting to do the right thing, wanting to alleviate stress, wanting to calm people down because there seems to be -- you know, there's a lot of panic, as he said.

But at the flip side of it, it almost makes me feel like there's not a consistent manner in which we are addressing the system or this -- strike that -- not system -- addressing this situation.

And I think we need to have consistency, a consistent message, a consistent notice, a consistent manner in which we're rolling out the bottled water program. And I don't certainly want to say that the City is doing the wrong thing. They're doing the best they can in an awful situation. And they're showing empathy, and they're showing compassion for an individual standing on a long line who is pregnant or who has got a baby in her hands. They're showing compassion.

So I certainly don't want to dissuade them from doing that. But I have to say that there does appear to be a haphazardness in the manner in which we are dealing with this awful situation.

MR. KLEIN: And, Your Honor, Mr. Adeem acknowledged that the situation is evolving so fast that they have to make decisions on a lightning basis.

There's a Ralph Waldo Emerson quote that will not spring to my mind, the point at which is essentially that consistency is not possible -- perfect consistency is not possible. And that's particularly true with respect to public governance. And it's even more particularly true with respect to public governance in a crisis situation.

Because if there was some easy, consistent, mathematically provable circumstance or solution to this problem, we wouldn't be here a year into this litigation and not have thought of it yet.

I mean, there are a lot of people at the City, at DEP, at EPA, at law firms, at NGOs, within this court, a lot of people who are thinking about how best to deal with this. And if there was a perfect, consistent solution to be had, I think we would have found it.

So I'll agree with you, Your Honor, that I wish a more consistent solution was at hand, because there is something, somehow compromised feeling about what Mr. Adeem described as the policy with respect to the people who show up in the lines. It seems somehow a little imperfect.

But it also seems to me to be the best of the options on the table because you've heard a lot of testimony about the damage it could do in the Wanaque to the people and to the system and their plumbing if bottled water gets ordered and handed out.

But it's also very clear, I think none of us would dispute that it's not an ideal situation for there to a shoving match between a pregnant woman and a worker at a distribution center. And the fact that a city doesn't want that to happen is entirely reasonable.

And when you take those two really hard and fast, you know, rock and hard place on each side, you end up finding something in the middle that feels imperfect but is the best way to go about this.

And I'll add one more point on that. When those type

of imperfect solutions are necessary, you've got to allow them to be in the hands of the people that are best positioned to make them.

THE COURT: Can I ask you a question? Why then, if it's being done already, because of the consideration of not wanting to get into a tussle with a pregnant woman or a woman that's nursing, and it's pretty much being done at these four distribution centers, why would it not be acceptable to have a distribution center for pregnant women or women that are nursing exclusively, to pick up this water at Wanaque for a very short durational period?

MR. KLEIN: Your Honor, I'll give you my honest answer. Standing here, I don't know. That's not -- I'm not good at that kind of thing. I'm just a lawyer, you know, and I don't know whether that's a good or bad idea.

I'll be honest and tell you that I've never thought of it before just this moment. And so maybe there is a good reason for it or maybe there isn't.

But what I am quite certain of is that this Court is the wrong place for that question to be decided.

If it's a good idea, the City and its overseers at DEP and EPA are very likely to come to it. And if it's not, they're also a best position to avoid it.

Here, we haven't heard any evidence about whether that would be a good idea. And what I don't think would be a

good idea would be for us to decide here in this room on that without knowing.

THE COURT: Again, I only -- I only offered it because it's already being done. It's already being done in Pequannock at the Pequannock -- at the four distribution centers. Based on the testimony of Mr. Adeem, he said they're doing it.

And I again said -- he said we try to educate them and I think it's -- I think it should be noted that the City is doing its best to educate its residents as to where they live and whether they live in an affected area and whether they live -- whether they are -- they have lead pipes.

It's being done. And I just wonder whether the City has contemplated, and whether the DEP and EPA have contemplated that if it's being done, and we're talking about the distribution centers in Wanaque that would only be open to mothers that are nursing and/or pregnant. And I recognize that we're getting towards the abstention argument, which the Court must consider in terms of likelihood of success, and we'll get there, but I just -- that was news to all of us in the courtroom yesterday. Mr. Adeem's testimony was news to all of us.

MR. KLEIN: Because it was new. This whole situation is new.

THE COURT: I get it. I get it. Believe me, I

understand.

Obviously, all of our concerns are with the City -- the citizens of Newark, all of our concerns.

And I also understand the position that the City is in right now, and I understand that, as he said, things change on a daily basis.

We heard Mr. Adeem talk about they had a meeting, and before you know it, before he even gets out of his car, there's a notification and everything changes. And now they're meeting on Saturday, and now they're talking about a rollout on Monday.

And clearly, one thing I got from Mr. Adeem is what -- they're trying. And they are consulting with DEP and they're consulting with EPA now on a daily basis since August 9th.

And they are -- things are shifting and moving, and all they can do is meet, talk about the plan moving forward for that particular day for those particular hours. And they seem to be wholeheartedly involved in trying to make the best of a very bad situation. I get that.

But we do know that it is being done, so why not extend it further?

MR. KLEIN: When you say "it is being done," I confess I'm not exactly sure what Your Honor is referring to.

THE COURT: Mr. Adeem said that if a pregnant woman

from Wanaque shows up at Pequannock, and she's obviously pregnant and/or is breastfeeding, the workers have been advised to give them the water.

MR. KLEIN: And so is Your Honor saying, if that's happening in practice, why not codify it? Why not formalize it? I have an answer.

The answer is codifying it, making it official policy, is the difference in message that is so important that that's the difference that may end up inadvertently harming people. Because now you send --

If you say, you know, you are all entitled to this, that is a very different message that says you shouldn't drink this water.

Even if you don't intend to send that message, the message sent, whether it comes from this Court, whether it comes from the City -- frankly, when it comes from NRDC too -- the message is, don't trust your water. Don't drink it. Don't use it.

A person who gets that message suffers from getting that message, if it's not the right message, because they are consigning their own home's plumbing now to not having enough orthophosphate.

So if you target that message to pregnant women and women with children, you have, quite paradoxically and unfortunately, targeted a message to pregnant women and women

with young children that will uniquely harm that group by making their homes the ones that aren't properly passivated with orthophosphate going forward.

And so there is a difference, Your Honor, in saying you all are entitled to this, please come get it; and just saying, if you showed up already, we're not going to argue with you.

Those two things are different. They are distinct.

THE COURT: Understood.

All right. Do you want to move with sort of synthesizing or summarizing the evidence, or are we going to go into abstention at this point in time?

MR. KLEIN: I would like to spend a few minutes talking about likelihood of success on the merits, unless Your Honor wants to hear more about irreparable harm.

THE COURT: No. I think I've have heard enough on irreparable harm.

MR. KLEIN: And I am willing for you to shove me off the podium when you're tired of hearing about likelihood of success.

THE COURT: Okay.

MR. KLEIN: But I want to raise it --

THE COURT: Please.

MR. KLEIN: -- because it is important.

THE COURT: Okay.

MR. KLEIN: So I essentially want to do this in three steps. I want to tell you very briefly about the Safe Drinking Water Act's citizen suit provision.

I want to persuade you that the smaller claims in this case that are not corrosion control claims, and by that I mean all claims except Numbers 5 and 6, that they are not claims that, even if they were proved, would justify this PI.

And then, finally, I want to talk about the corrosion control claims and try to persuade you that they are not valid claims.

So, first, the Safe Drinking Water Act. The difference between the Safe Drinking Water Act's citizen suit provision and the one in RCRA, Clean Water Act, Clean Air Act and some other smaller ones, is that all those other ones have penalty provisions.

If there is a violation, the Court can assess penalties. And it's a statutory number, and those numbers often run up very high.

That's important. And so it's important to try those claims to see whether there'll be penalties.

In the Safe Drinking Water Act, Congress left that out. The only thing this Court can do in a Safe Drinking Water Act citizen suit is injunctive or equitable relief. You can issue orders, but you can't assess penalties.

And that means that if we're going to talk about

litigating this case into the future, we need to ask to what end? What orders can you issue that will make things better?

That's essentially the only question before you. And that's what the Court has to keep in mind when it's evaluating: Is there a likelihood of success? Will I dismiss these claims? And if I do -- these corrosion control claims. And if I do, is what's left worth having years of litigation over? Because what can I do about them?

That's the background.

And so when you and I discussed this, Your Honor, yesterday, you said, Mr. Klein, there -- wouldn't you concede that there could be liability from any of these smaller, more picayune claims?

And I said, there may be.

But the point I'm trying to make is, we need to be thinking: What if there is? What would the Court do?

And if the answer is, practically speaking, nothing, because there are no penalties available and every injunctive possibility is already being done, that's what the Court should think about when considering whether this case is likely to succeed on the merits and whether the Court should abstain.

So with that said, I want to briefly go through some of these other claims to explain to you why I think they don't anchor these bottled water orders that the plaintiffs are

seeking. Okay.

So Claim Number 2 is an allegation that Newark was required to collect 100 Tier 1 samples and, in the first half of 2016, collected 40; collected 88 in the second half of 2017; and 93 in the first half of 2018. So that's Complaint Paragraphs 129 to 130, and it's what supports their Claim 2.

Now, Ms. Woods made some statements in her argument that I consider to be inaccurate. She said that what's at stake in that claim is did the City delay its response to the lead problem because of these sampling issues.

Their allegations are for 2017 only. But 2017 was a year, starting in the first half, where Newark exceeded the action level. And it wasn't close.

So whether or not they took the right number of samples is immaterial. They still exceeded. If they had had more Tier 1 samples, maybe they would have exceeded by a little more. But they exceeded in 2017.

So what does it matter if the sampling was still catching up? It wouldn't have changed the exceedance.

And the plaintiffs do not allege -- and this is what I think was inaccurately stated a moment ago. They have not alleged that there were that kind of sampling problem before 2017.

So let's say Newark loses Claim 2. What is a Court to do? To retroactively order an exceedance to be issued in

2017 that was issued? There's nothing.

Claim 3 alleges that Newark's sampling during that same period was supposed to be evenly divided between sites containing lead service lines and sites containing lead plumbing. And it's part of the Lead and Copper Rule that it's supposed to be like that, but that the balance was actually more like 2 to 1 instead of 1 to 1.

What if they win that claim? What does it mean for this Court?

There was an exceedance anyway. The alarm went off. So to say that maybe the alarm wasn't quite sensitive enough, what are we litigating?

THE COURT: But to Ms. Woods' point, it was -- these violations led to the problem that we have now.

And so isn't the Court now looking at whether indeed the -- what is the harm, and whether these violations occurred -- now I'm gauging -- was there a violation that led to, now, the particular situation, and should I now be assessing the harm at risk because of these violations?

MR. KLEIN: That is the core of my point. I'm grateful to you for isolating it in such an efficient way.

When she says these violations led to this harm, that is false. That is what I'm trying to express to you.

That's like saying your smoke detector's battery running low led to the fire. But if the alarm was going off

the whole time, then the low battery didn't lead to the fire. It's immaterial.

The alarm went off in 2017. So the fact that it might not have been sensitive enough did not lead to anything. It's irrelevant.

THE COURT: And her point that if, indeed, the sampling was -- that Newark was not sampling as they should have leading up to 2017, they were not taking the appropriate Tier 1 samples, and had they been, perhaps they would have been alerted earlier than 2017; one, you say, it's not alleged.

MR. KLEIN: It's not alleged. It's not alleged. I can only deal with what's alleged.

THE COURT: Okay.

MR. KLEIN: That's what we've been trying to convey for a long time, that there are real, really significant gaps in this complaint. And I'm glad that I now have the opportunity to discuss that with the Court.

So Claim 4, sort of at a similar level. It alleges that where Newark could not access --

MS. WOODS: Your Honor --

THE COURT: Hold on one second.

MS. WOODS: I'd just like to make clear for the record that none of this is in the briefing. They did not respond with any of these sorts of arguments in their response

to our --

MR. KLEIN: I am literally reading from my briefs. I copied and pasted a page of my brief into my notes.

THE COURT: All right. So, Counsel, you're going to have an opportunity --

MS. WOODS: Not from the PI briefing, though, correct?

MR. KLEIN: I believe it's from my motion to dismiss, which is what we're talking about here.

THE COURT: Okay. But I'm doing likelihood of success. I mean, I even had to go back and look at the motion to dismiss somewhat because there were similar arguments raised in abstention.

You guys were on notice that I had to address likelihood of success. So this shouldn't come as a surprise that these are the arguments that are being raised at this point, even though I am looking at it for purposes of likelihood of success, and it's a preliminary injunction.

MR. KLEIN: They also responded to them. They filed an opposition brief on these.

MS. WOODS: I understand, Your Honor. Just that they weren't in the PI brief.

THE COURT: I understand. Noted.

MS. WOODS: They had an opportunity to address it and didn't.

MR. KLEIN: With respect, our motion to dismiss was incorporated by reference into our PI brief.

THE COURT: Just one second. Let me just -- I don't want to --

Mr. Selecky.

(Brief pause.)

THE COURT: I just want to remind counsel that I have a criminal defendant that I have to sentence at 12.

So we're going to let Mr. Klein -- what we'll do is you all can take a lunch break. I will sentence the defendant and see you all back for continued argument.

MR. EPSTEIN: Your Honor, if I could just ask, do we need to clear all of our stuff out?

THE COURT: Just push it forward.

MR. EPSTEIN: Okay.

THE COURT: Just push it forward. This is a pretty straightforward criminal matter, so they're not going to need a lot of space.

MR. EPSTEIN: Thank you.

MR. KLEIN: So that means now we'll pause. Or do you want me --

THE COURT: No, no. Keep arguing until I see defense counsel, which I want to see if I see defense counsel, we're going to go ahead and call for our defendant.

But go ahead, Mr. Klein.

MR. KLEIN: I'll speed up a little because all of these other claims make the same point: It didn't lead to this situation.

They are minor regulatory violations that are entirely subsumed in the fact that in 2017 the alarm started ringing, and here we are. None of these things led to this situation.

And that means -- and I don't need to go through every single one, and I think I've made that point. And if the Court is interested, it's spelled out in the briefing.

But if -- if the Court dismisses the corrosion control claims, which I want to discuss after the sentencing, all that's left is a bunch of things that the Court both cannot find led to this situation and cannot do anything about now because either it's completely in the past or it's already subsumed in a DEP compliance order that the City is following.

So that is why we paired our motion to dismiss with a request for Your Honor to abstain.

What we said there was Your Honor should dismiss the corrosion control claims because they don't state a claim on which relief can be granted. And we'll talk about that after sentencing.

And then we said, if all that's left is the rest of these picayune, miniscule claims, they don't -- it's not enough. There's nothing for the Court to do anymore.

THE COURT: Can I ask, is the City making a concession that some of these smaller violations did occur? Were there violations that --

MR. KLEIN: I'm not going to make a blanket concession.

I think the only thing I'll be prepared to concede is I don't think the City met the timing requirements of the lead service line replacement program that's in the Lead and Copper Rule. But there was absolutely, under the circumstances, it was not possible.

And DEP understood that. DEP said, okay, now here's your schedule. It's an aggressive schedule. It's not that different from what was there before. Newark is already working on it. It's not greatly different than what the Lead and Copper Rule says.

And I want to say, I don't want to legally concede that. But in the spirit of trying to fairly answer --

THE COURT: I guess I have a question for both sides, though. If DEP gets involved and DEP authorizes an extension of any deadline, is that a violation?

If DEP then has pretty much authorized extensions, is it a violation?

MR. KLEIN: Is it a violation by whom, Your Honor?

THE COURT: Is it a violation by the City of Newark if indeed they've agreed to a time frame with DEP that doesn't

necessarily accord with the time frames outlined in the Lead and Copper Rule?

MR. KLEIN: I think in some ways that's an academic question. I mean, it --

THE COURT: I think it's important, though. It's, I think --

MR. KLEIN: -- may be a violation, but --

But what would it mean if it were a violation? That's, to me, what the more important question is.

Assume for a moment that legally it's a violation of the Lead and Copper Rule on the provisions about timing for lead service line replacement. Assuming.

What then? There's no penalty to be assessed for it. There's only injunctive relief.

So would the Court order Newark to retroactively comply with timing requirements that are now past anyway? Or would the Court -- the Court would have no choice but to say, here is the timing that you have to follow now.

But DEP has already done that. Why would the Court do it again?

So maybe it's a violation. Even assuming it is, why is it one the Court --

THE COURT: I think Ms. Reddy wants to hand you something.

MR. KLEIN: Ms. Reddy, I'm looking at your

handwriting.

This -- okay. What she's told me is correct.

She says the order that DEP has issued is a consent order. So they have not determined that there was a violation. And that's an important point to clarify for the record.

But my point, to answer your question, Your Honor, is if it were a violation, it's one that's not practically remediable by this Court.

And in that circumstance, you know, I think -- I have a sense that if I dug into the law on that, I would find that a violation that is not remediable is not something the Court needs to concern itself with.

THE COURT: All right.

So I do see our defense attorney has walked in, so I am calling for my defendant now.

Here's what I would like the party -- here's how I anticipate us moving forward.

Obviously, Counsel, you're going to continue with your arguments as it relates to likelihood of success. And I assume we'll get into the area and argument of abstention.

Then I would like to hear from DEP on some of the questions that I raised yesterday at the conclusion of our hearing yesterday.

MR. KLEIN: May I propose one small tweak to that?

THE COURT: Sure.

MR. KLEIN: May I finish my argument on the PI? And then, perhaps, the Court can hear from Ms. Heinzerling. That will inform the arguments about abstention.

THE COURT: That's what I wanted to do.

MR. KLEIN: And so then, after she's done, I'll start my argument on abstention? I'd like to --

She's going to tell us all, here's how they've been collaborating. And I would like to incorporate that into the arguments I make to Your Honor about abstention. I'll show my cards about that.

THE COURT: Okay. Okay.

Either way, I want the plaintiff to have all of that, all of that information, before they address the Court on these issues.

MR. KLEIN: As they should.

THE COURT: Because I think it's important.

So if that's how you want to do it, you conclude on the PI issue. Then we turn it over to the DEP to sort of outline and illuminate the facts as they currently exist between the DEP and the EPA in a more general, broader sense, and a more fine-tuned sense when we're talking about the instant matter.

Then you can then use some of the statements that have been made by counsel and incorporate them into your

abstention argument. And then, finally, I'll hear from the plaintiffs.

Sound acceptable?

MR. KLEIN: Yes. Thank you.

THE COURT: Wonderful. So let's go ahead.

Mr. Selecky, what time do you think by the time the defendant comes up?

(Judge confers with the Deputy Clerk.)

THE COURT: So the parties in the Newark water case have a little longer than I'd normally want to do. But we do want to be fair to everyone that's manning the case on my side of things.

So let's go ahead and say 1:15. We'll come back, start sharp at 1:15.

Just one second, everyone, please.

1:15, we will continue with closing arguments.

We're in recess.

THE DEPUTY CLERK: All rise.

(Lunch recess taken at 12:03 p.m.)

AFTERNOON SESSION

(In open court at 1:24 p.m.)

THE COURT: Good afternoon to everyone, once again. Everyone please be seated.

We're on the record in, again, the matter of *Newark Newark Education Workers Caucus, et al. v. City of Newark, et*

al, Civil Action Number 18-11025.

Okay. Let's continue with our closing arguments by the defense.

MR. KLEIN: Thank you.

I want to set the record straight in case I misspoke on a point earlier. I did not intend to say that DEP ever granted Newark an extension to complete its lead service line replacement program.

DEP set a schedule to replace lead service lines, just as this Court would do if it came to that. But DEP did not extend a deadline, and I think that's a relevant distinction. If I was unclear about that, or misstated it, I want to correct that record.

Okay. That being said, when we were here before the sentencing, we were speaking about the claims in this case that are not corrosion control claims. There's two corrosion control claims and then a handful of seven or eight that are not.

And I hope that I have begun to persuade Your Honor that, realistically speaking, there may not be much to this case outside the corrosion control claims. And I'm certainly happy to answer questions about that.

But I certainly think it's something that the Court should give attention to on the question of likelihood of success on the merits.

So that being said, I would like to move to the last piece of my argument on the PI, to the question of these two corrosion control claims.

THE COURT: And they are claims?

MR. KLEIN: Claim 5 and Claim 6.

So Claim 5 is a claim that Newark never installed corrosion control. And I hope we can all agree at this point that that's a baseless claim that has been refuted on the record now.

Mr. Adeem told this Court yesterday that it was installed in the Pequannock in 1995. That's transcript 259, Line 17. Plaintiffs have not offered any counter evidence. And in fact, the entire environment of this case is heavy with references to the silica treatment that is currently in use in the Pequannock, now being supplemented with orthophosphate. Claim 5 will fail.

The other one, and the only one, really, that's left in this case that is something that the Court should spend time grappling with is Claim 6.

Claim 6 is the heart of this case, and those are words I've written now, I think, in three or four briefs, and it continues to be true.

That's the claim that Newark failed to operate and maintain optimal corrosion control treatment for lead in drinking water.

But that language that I just cited is just a recitation of statutory language. It's like alleging a breach of contract or negligence. Without content, it's not enough to state a claim for relief. You can't just recite magic words that are statutory elements or elements of a common law cause of action. The Supreme Court has been more than clear about that.

So plaintiffs have to allege how Newark failed to operate and maintain optimal corrosion control treatment. They have to allege what did Newark do that amounted to a violation of that statutory language.

And it's not enough to say that there's been an exceedance of the lead action level. The parties have agreed in papers that an exceedance on its own is not a violation of the regulation. EPA is on record saying that. That's in plaintiffs' briefs agreeing with that. It's not contested here.

To merely say, you exceeded 15, even if that exceedance was 20 or 30, that is not a violation of the Lead and Cooper Rule.

In our briefs we analogized it to a medical protocol. You might say, well, the medicine didn't work, but it's not actually -- no one violated anything unless you didn't follow the protocol for the medicine.

Just to say the medicine failed and the patient is

still sick is not a violation. And so too here.

Merely, if having a 90th percentile go to 20 or 30 or 50, or like Dr. Reiber pointed out in Charleston, 400 even, is not against the law. And plaintiffs don't say that it is.

So the question is, well, what was here then? What is it that they're saying Newark did wrong?

And my proposal to you, Your Honor, is that is not in the complaint. I've read that complaint a lot of times and I haven't found it.

Now, it's hard to argue an absence of something. I can't cite to you something to refer you to an absence of a key element of a claim. So what I would do instead -- and I'll be honest in saying I've been wanting to do this for a long time -- I would offer that the Court should potentially take the opportunity, if plaintiffs' counsel comes to this podium for rebuttal, to just simply ask that question: Point to an allegation in this complaint that is not either a recitation of statutory language or an allegation that the action level was exceeded.

Neither of those is actionable. There has to be something else.

So ask plaintiffs' counsel, point me to the paragraph where I can find something else. And if it's not there, then there's no legal case here at all.

Claim 6 should be dismissed for failure to state a

claim. And without Claim 5, which was refuted by Mr. Adeem, and without Claim 6, which is not really even been alleged, this is not even a case.

And with that, I'm done.

THE COURT: So let me ask you, Counsel, though, and I am going to challenge the plaintiff to answer the question at the appropriate time, which is to cite either the portion of the complaint that addresses specifically support for Claim 5 --

MR. KLEIN: Six.

THE COURT: I'm sorry. Claim 6.

With respect to the corrosion control treatment, I understand that you're saying an exceedance is not a violation. But clearly, the treatment that was put into place, I think in 1995, but this sodium silicate, it didn't work.

Are you suggesting that it's the City's position that nothing in the Lead and Copper Rule requires the water system's corrosion treatment to actually work?

MR. KLEIN: That is exactly what I'm saying. And I want to explain why.

There are 88 substances that are regulated by the Safe Drinking Water Act. So two of them are lead and copper and they're regulated by the Lead and Copper Rule. But there are 86 others, give or take. Maybe my numbers are off a

little. But there are 80 some others that also have their own rules.

And the way it's typically done is what is called a maximum contaminant level. That means EPA just decides this is the most you're allowed to have.

So take mercury. There's some level of mercury that above that in a sample is a violation of the rules governing mercury. It's one of the National Primary Drinking Water standards. And that's fairly simple to do.

Now, when it came time for EPA to write the Lead and Copper Rule in the mid '90s, they had a problem. There were a lot of people, including NRDC at the time, that said you should have a maximum contaminant level for lead too. Let's do it that way. That's the normal way.

But the EPA went a different way. The Lead and Copper Rule is what's called a treatment technique rule. And that is where it is not feasible to set a maximum limit. What they do instead is to say they will prescribe to a water system, here is what you have to do to treat for lead. And that's what they did.

And you have heard now why they did that. Dr. Reiber explained, you can't eliminate lead hits, and that's through no fault of the water system. They will happen. It's because they come off not even on the water system's property. They come into the water on private property. And they happen.

And EPA knew that in the mid '90s.

And so they said we can't have a maximum contaminant level because the 424 parts per billion sample would be a legal violation and no one can control that from happening sometimes.

So for that reason, EPA said, okay, we won't have a maximum contaminant level for lead. We will have a treatment technique, which means, systems, you have to do A, B, C, D and E. And that's the Lead and Copper Rule. It's complicated, but that's what it is. It's a set of rules for what systems have to do. And if you get your lead past 15, there's a whole lot more rules you have to do.

The NRDC challenged that approach in a case in the mid '90s, and the DC Circuit ruled against NRDC and in favor of the EPA. I apologize that the case name is not at my fingertips, but it's in our briefs. My colleague might be able to do it. That's how it's been ever since.

So that is the answer to your question. It may seem counterintuitive, Your Honor. But you said, you're telling me that it's not illegal to have lead at 60 parts per billion? And the answer is: It's not.

That's what we've been trying to say in our motion to dismiss.

They have to allege that the treatment technique wasn't followed, and they haven't.

THE COURT: So you say that the allegations have to be that the treatment technique was not followed. In other words, that the State's optimal corrosion control parameters were not followed.

MR. KLEIN: The State -- there are a series of steps. And it's important to note that some of them are the State's job and some of them are the City's job, and NRDC has alleged against both, and they may come up here and cite, we allege violation of this step and that step and that step. But the Court should ask, is that an allegation against the State or the City? Because it matters.

For example, if the State --

THE COURT: Break that down for me.

MR. KLEIN: Sure. The State is obligated to designate optimal corrosion control, which we talked about yesterday; that means to choose.

They have to make a selection after getting recommendations.

THE COURT: And the State made the selection in 1995 of the silicate?

MR. KLEIN: It's my understanding that they did. It's my understanding that they did.

Let's say for a second that they didn't, just for the sake of argument. Whether that's a viable claim against the State, I think, turns on a lot of factors about whether a

regulator can be sued, and that has been briefed for Your Honor as well by the State. The State makes arguments to say we're the regulator, you don't sue us as a citizen suit. And that's before Your Honor, and I won't comment on that.

THE COURT: Walk me through this for a second. We talked about, and it's still unclear to me why this one regulated system that we all agree now is one regulated system, why in 1995 we chose the sodium silicate --

MR. KLEIN: On one side, and ortho on the other.

THE COURT: -- in the Pequannock. And you, I think, argued yesterday, and I think you're arguing today, that it was designated by DEP that they utilize that. And then in 1997, they would utilize the orthophosphate for Wanaque.

That to me -- I mean, again, I understand that in discovery, and if the case does continue we're going to get some answers on that, but I think the issue of who designated the treatment corrosion plan for Pequannock is a critical issue. Is it not?

Because, again, if it was the State who designated it -- and you say that the City was obligated then, and I think we had some argument about it, where there was, yesterday, the idea of, you know, that's a designation -- or two days ago when we were on a conference call -- the days are merging now.

But there was an issue of, you know, we are then obligated to put it into effect, but they have the power to

designate to us what we are going to utilize.

And in that situation, then I think your argument makes a little bit more sense to me, which is, if we don't control what treatment -- corrosion treatment plan is utilized, and that is not within our power to designate, we just have to follow it.

MR. KLEIN: Yes.

THE COURT: Then -- then we're following it. If it isn't effective, that doesn't subject us to liability because we followed the parameters that were mandated.

MR. KLEIN: You have understood exactly what our argument is.

THE COURT: That's what your argument is?

MR. KLEIN: Yes.

THE COURT: So the question is, though, who designated that treatment plan?

MR. KLEIN: It was the State's responsibility, their sole responsibility. No one else can but the State. That -- the Lead and Copper Rule is clear about that. It says step -- it might be two or it might be three, the State designates corrosion control.

I think number 1 is the City studies. And number 2 is the State designates. And number 3 is, you know, they put into place water quality sampling, monitoring parameters. I may be getting the exact numbers wrong, but there's a process,

step-by-step.

Some of the steps are the obligation of the State and some are the obligation of the City. And I challenge the plaintiffs to name an allegation in their complaint where the City failed to live up to one of its steps beyond simply parroting the statutory language.

They will come up here and say, well, they failed to optimize -- operate and maintain an optimized corrosion control, Your Honor. That's like saying, well, they breached a contract, Your Honor. It's not enough.

You can't just cite a statutory bit of language. You have to say how.

THE COURT: So what do you say in terms of our pleading standard, they would need to say is that they would have to allege an actual failure on your part to follow the treatment parameters that that particular --

MR. KLEIN: There's a great example here I can give you.

THE COURT: Give it.

MR. KLEIN: Flint. In Flint there were allegations, I won't comment on the truth or falsity of it. But the allegation was that Flint switched its water source from the Detroit facility to the Flint River and after the switch they never got around to putting in corrosion control again. That was the allegation against Flint.

That, if true, would be a classic violation of the Lead and Copper Rule. They didn't do what they were supposed to do, the treatment technique prescribed by the Lead and Copper Rule. The NRDC would have had a terrific lawsuit if they had framed it that way. I think they did sue Flint on grounds like that. That's how it's meant to work.

Now, the problem here is Newark is not Flint and plaintiffs haven't alleged that they are in the sense that they didn't do something that they are prescribed to do.

Their claims boil down to lead is out of control and we're suing you. But that's not a cognizable allegation under the Lead and Copper Rule.

And if you can have them persuade you at this podium that they allege something better than that, I'll accept it. But I don't think it's there.

And it personally means a great deal to me. I feel like I've been in the lawsuit for a year that is just fundamentally a mirage. And I would like the Court to at least ask the question.

THE COURT: Let's have them answer.

Am I dealing with a mirage, Ms. Woods?

ARGUMENT BY MS. WOODS:

MS. WOODS: No, Your Honor. You are certainly not dealing with a mirage.

I'm just going to respond to a few of the points that

Mr. Klein raised.

First of all, before we filed this case, we submitted multiple Open Public Records Act requests to the City and we asked for the designation. We asked for the documents that were required to be prepared in the 1990s. We also submitted open public records requests to the State and we asked for the designation.

No designation was ever provided to us. There is no record that I know of that the designation -- aside from the plan that the City provided, there is no actual designation document by the State that the City has. They said they didn't have it. There's an e-mail from the City to the State that says: We don't have the designation. Do you have it? I believe that was around 2016.

If that's the case, if the City didn't have the designation for all that time, how could they be following it? They couldn't. If the employees at the water department didn't know what targets they were supposed to meet, if the State didn't have a copy of the designation and didn't understand what the targets were, didn't know the current people working at the State didn't know -- have documentation of what the targets were, how could anybody have been following those targets?

THE COURT: Do you, Ms. Woods, can you enlighten me, do you at least agree with Mr. Klein that it is the State that

must designate the treatment plan?

MS. WOODS: The State must designate the treatment plan and the City has to follow it. So the City says -- so what I just said is one option. But the City says that there was a designation.

If there was a designation, how would they follow it?

Sorry. If there was a designation, it's clear they didn't follow it.

THE COURT: Wait a minute. Hold on. Let's unpack that a little.

MS. WOODS: Uh-huh.

THE COURT: So you've asked for, through discovery, is there presumably, and enlighten me, would there have been something issued by the State DEP saying we're designating this corrosion treatment plan for you to follow?

Is there a normal document that would have been forwarded in the 1990s from the State to a city, and in this case Newark, that this was now the treatment plan you were going to utilize in Pequannock? And is there a similar document for the treatment plan that was selected in 1997 for Wanaque?

MS. WOODS: Your Honor, one issue here is that we have been completely barred from discovery on these issues, so we don't have access to these historical documents except for, primarily, what we received from OPRA in the Open Public

Records Act request.

THE COURT: Did you ask for these documents --

MS. WOODS: Yes.

THE COURT: -- for Pequannock and Wanaque?

MS. WOODS: Yes.

THE COURT: Does Wanaque have a designation document?

MS. WOODS: We never -- to my knowledge we never received it. We've had a very difficult time. There have been multiple orders in state court under OPRA to require the City to produce documents to us. We've had a very difficult time getting documents.

THE COURT: So at this current moment, you do not have a designation document from the State to Newark for either Pequannock and/or Wanaque?

MS. WOODS: Speaking about Pequannock, I know for sure we don't. I don't know off the tip of my tongue about -- I wouldn't want to misrepresent that, but I don't believe we have either.

And the evidence that has come out since corroborates the failures that have occurred as a result.

THE COURT: Okay. So let's just say, if indeed it is the State's obligation to designate the corrosion treatment plan, corrosion control treatment plan, and -- it's a hypothetical -- and the State did designate the plan in 1995 for Pequannock, do you concede that if the City followed that

treatment plan, they could not be liable for -- if they follow -- hypothetical -- if they followed the treatment plan, they could not be liable at this point in time?

MS. WOODS: Your Honor, that's exactly why the rules requirements have tap water sampling requirements and water quality parameter monitoring requirements, which the City did not do.

And the consultants -- the City's own consultant's report says that it's likely that during that time period there were problems with tap water monitoring, during the 2010s. And the consultant also --

THE COURT: I understand. I'm going to let you get to that. I'm going to -- this is the only thing I have other than another emergent application if it does come in. This is what I have. I want to understand the arguments.

I'm going to give you the hypothetical. Okay? And you need then -- you can answer it utilizing the evidence that you currently have.

MS. WOODS: Uh-huh.

THE COURT: But just answer my question.

If it is found that DEP designated the treatment plan -- and that's that sodium silicate plan -- in 1995, and the City then followed through with administering it and following it, do you concede that indeed there is no liability as to the City with respect to that -- with that fact pattern in mind?

MS. WOODS: No, Your Honor, because there's an obligation for the City to be monitoring and maintaining the -- the -- well, let me just walk back.

I think the facts are really important here, and I don't think we need to address that question in isolation, because the CDM report says that Newark changed its water quality, that it lowered its pH during this time period. That is -- I don't have the designation, but that would be a change from the designation for sure.

THE COURT: All right. So if there was a designation in 1995, issued by DEP, and the City unilaterally lowered its pH, which would not have been in accordance with the designation of 1995, that there would be proof of a violation that would subject them to liability?

MS. WOODS: Certainly.

THE COURT: Okay. Now, let's go with the other scenario, that somehow there was never a designation to utilize this corrosion treatment plan -- corrosion control treatment plan, that the City unilaterally then chose something other than the orthophosphate that was used in Wanaque. Then you say they never received a formal designation. So them implementing this plan that they implemented in 1995 subjects them to liability because there were no parameters to follow. They followed whatever they felt like following, and that's contrary to the law, right?

MS. WOODS: That is the allegation.

THE COURT: Right. So then you say, and I know you're looking at me inquisitively.

MS. WOODS: No, I'm just trying --

THE COURT: Right now we don't have a document that says who designated the plan. But assuming you, as you stood up a few moments ago, to say that you have no designation document.

MS. WOODS: Uh-huh.

THE COURT: So it appears that perhaps the City chose, without formal designation by the State, then that in of itself is a problem because there are no parameters to follow because it wasn't designated by the State.

MS. WOODS: Yes. And I just want to be clear, I believe that there is a proposal that the City submitted, but what we don't have is the response from the State.

THE COURT: So we have a proposal from the City to use this plan in the 1990s, yet there is no document that the State authorized that plan?

MS. WOODS: That we have received in discovery thus far, or before the case was filed.

THE COURT: Through OPRA?

MS. WOODS: Yes.

THE COURT: So if that's the case, again, to support your position, they wanted to use this. They needed to wait

to see if the State approved it. They failed to get the appropriate approval. And therefore, Mr. Klein's theory that they were just following the parameters of the corrosion control plan is not a viable defense because they followed a plan that was not approved by the State in the first place.

MS. WOODS: That is one option. There are several different iterations, and the facts are really important. We don't know what the facts are here. We need to discover them. And we have indications that there were major problems at these plants. The Griffiths' declaration explains major deficiencies in the operation of the Pequannock plant.

THE COURT: Mr. Klein, I'm going to let you respond. Tell me. Tell me some of them. Point to the complaint where I can find it.

MS. WOODS: Well, the complaint -- I believe we received the document that describes those deficiencies after the complaint -- after the complaint was filed, so I don't believe those details are in the complaint.

THE COURT: Well, you know you can't amend a complaint through argument either in a brief or on the record?

MS. WOODS: Yes.

THE COURT: So if the complaint is deficient as it currently exists, then this Court obviously may have to give counsel -- I'm not saying I wouldn't -- but I may have to give Mr. Klein the relief he is seeking in short order if you're

telling me you don't have these allegations in the complaint.

MS. WOODS: No, that's not what I was saying. I was talking about details that we learned after the complaint was filed. We do have an allegation in the complaint.

THE COURT: Tell me where.

MS. WOODS: It's based on the State's designation.

NRDC has requested, but not received, public records demonstrating that Newark maintains optimal corrosion control treatment as required under the Lead and Copper Rule. NJDEP's July 11, 2017 notice of noncompliance to the Department of Water and Sewer Utilities concluded that Newark water department is deemed to no longer have optimized corrosion control treatment.

THE COURT: Mr. Klein, there's the paragraph. What do you say?

MR. KLEIN: That's not an allegation against the City of Newark, Your Honor. It isn't.

THE COURT: Who was it against?

MR. KLEIN: I don't think that, that they just read is an allegation against anyone.

But if, for example, they think the State didn't designate corrosion control, that's an allegation against the State. It doesn't make the City liable if the State didn't do its part of the job.

MS. WOODS: Your Honor, our claims are in the

alternative. We alleged both that there wasn't a designation and, if there was a designation, they didn't follow it. Those are alternative claims. And we've made that very clear in the briefing.

MR. KLEIN: But not followed it how? Where in the complaint does it say that? That paragraph wasn't it.

THE COURT: All right.

MS. WOODS: And the action level exceedances are not a violation on their own, but they are indicative of a failure to optimize corrosion control treatment. There is -- that is clear.

THE COURT: Well, if they're not a violation on their own, what do you need to plead in order for it to be an allegation that is supporting your position? Do you need to then say -- are there magic words or --

I mean, obviously, Counsel, I'm looking for you to tell me where within the complaint you say the City did something that obviously led to it not effectively treating the water in Pequannock.

MS. WOODS: Your Honor, their failure to operate within water quality parameters is one factor to look at.

THE COURT: Okay. Explain.

I'll let you respond, Mr. Klein, in a minute.

MR. KLEIN: Which paragraph?

THE COURT: Yeah, we'll follow along. Which

paragraph?

MS. WOODS: Paragraph 173 says: NJDEP does not have any records documenting its designation of optimal water quality parameters for the City of Newark. The City of Newark has informed NJDEP that it does not have any documentation of optimal water quality parameters established by NJDEP.

On information and belief, NJDEP has not designated optimal water quality parameters for the water system.

MR. KLEIN: And, Your Honor, that's an allegation against the State, not the City.

THE COURT: So then the next point that you would make, Ms. Woods, which may not be here necessarily, is what?

MS. WOODS: It's clear that the City's -- the way the City has operated has not been in compliance -- if the designation was made, the City has not operated in compliance with it.

We don't have the designation. It was never provided to us. They don't have it. We don't have it. So how could they be operating in compliance with a designation if nobody has it?

THE COURT: So if there was no designation -- follow me here.

If there was no designation, then the City of Newark has violated the law by implementing a plan that was never sanctioned by the New Jersey Department of Environmental

Protection.

MS. WOODS: Yes, that's one option.

THE COURT: Is it in here, though?

MS. WOODS: Your Honor, the pleadings can be amended as discovery comes in. And that's one potential situation that we're in right now, to conform the pleadings to discovery. We haven't had an opportunity to discover here.

And there's a lot of concerns. CDM concluded that between 1992 and 2017, lead results from the Pequannock suggest that treatment was relatively ineffective, that the addition of sodium silicate in 1997 was ineffective in lowering lead levels and that the Pequannock service area experienced ineffective treatment over time.

From 1992 to 2017. That is Exhibit 41 to the preliminary injunction briefing.

That -- it's clear that there have been treatment failures by a lack of diligence and a lack of attention by both the City and its -- and the State here.

And we have discovered much of that in the last year since we filed the complaint, but we also knew, based on the failure to respond to our OPRA request with actual documentation about any of this, that there was a problem.

THE COURT: Anything else that I can find in the actual complaint?

MS. WOODS: I apologize, Your Honor. I wasn't

prepared for this argument today fully. I thought it was just going to be about harm. But let me take one or two moments.

Your Honor, if I could, I think the best thing to do would probably be to let the State proceed, and we can return to this at the end of the abstention arguments.

But I would say that the NOVs clearly provide a -- state that the corrosion control treatment is ineffective. And they, presumably, are basing it on their own designation.

So if they really did have a designation, they determined that corrosion control treatment was ineffective based on that designation.

THE COURT: Okay. We'll let you continue to respond to this after we've heard --

MS. WOODS: Thank you.

THE COURT: -- final arguments from Mr. Klein. And then we're going to move it over to, obviously, the NJDEP.

MS. WOODS: Thank you, Your Honor.

ARGUMENT BY MR. KLEIN:

MR. KLEIN: Your Honor, the citation I was looking for earlier is *American Water Works Association v. EPA*. It's 40 F.3d 1266, DC Circuit, 1994.

Likelihood of success on the merits is part of a PI hearing. This has been briefed endlessly. Motion to dismiss, opposition, reply, PI motion, raising the argument, opposition, reply. Six briefs have contained these arguments,

so they had notice that this could come up.

I want to focus where we ended up in the Court's colloquy with Ms. Woods. We heard her ask if the complaint could be amended later based on discovery.

But we're a year in, and the Court has to determine likelihood of success on the merits based on the complaint that's filed. It's not good enough that they might have plans to amend their complaint later.

THE COURT: But, you know, quite frankly, Mr. Klein, that this District has a long history of wanting to see cases decided on the merits. And I'm certainly not going to grant any motion without an opportunity for the plaintiffs to amend. You should be on notice of that as well.

MR. KLEIN: Certainly.

THE COURT: All right?

MR. KLEIN: And I understand.

THE COURT: And I'm sort of -- I'm waiting, unfortunately -- I'm asking one of my law clerks to just inquire with Judge Waldor.

What's the -- why --

Ms. Woods keeps saying she hasn't been able to get anything in discovery. Why is that the case?

MR. KLEIN: Discovery on the merits of this case haven't commenced yet.

THE COURT: But didn't I, at some point, order that

we were going to do discovery with respect to the preliminary injunction, and is this not an issue for --

Or did Judge Waldor not grant any discovery as to the PI?

MR. KLEIN: Well, they have asked for corrosion control-related discovery. And we said, and Judge Waldor agreed, that's -- there's no distinction. If we start that now, that's full case discovery.

The Court was very clear, the injunction is about the filter program up, until last Friday. And so Judge Waldor granted a lot of discovery related to the filter program, but on Claims 5 and 6, which were not about the filter program, she didn't. And that was right. She was proper to do that.

I want to highlight one more thing, and I don't want to be up here too long.

Ms. Woods was here, and she was using the word "ineffective" over and over. "Your Honor, it's not effective; it's been ineffective." We pointed out that in our brief. They did the same thing in their brief, saying how ineffective it was.

But that's my point. It's not against the Lead and Copper Rule for treatment to be ineffective.

If this was a maximum contaminant level rule, it would be. But under the treatment technique rule, the medicine can fail. It's not against the law for it to fail.

The only thing that's against the law is not to follow the steps to study and implement it. The fact that it failed is not a violation.

THE COURT: But this issue with respect -- and again, I'm certainly not going to put this on Judge Waldor because, you know, obviously, I don't know what was argued in front of her with respect to discovery.

But this issue of a designation letter, is this not a critical issue?

In one end, you can't use it as a shield and a sword. You can't say I'm not going to give you the designation letter -- if it exists -- I'm not going to give you the information that you need, and then say, by the way, you have to tell us whether, you know, whether it was -- you know, you're asserting that it was never designated, and that's against the State.

MR. KLEIN: I'm not using that as a --

THE COURT: I mean, why are we playing hide the ball here? Is there a designation letter or is there not?

MS. HEINZERLING: Not that I'm aware of.

MR. KLEIN: I'm not aware of it either.

And I'm not using it as a sword, just a shield.

What I'm saying is --

THE COURT: So there's no designation letter?

MR. KLEIN: I don't know. We haven't had the

commencement of discovery about that.

But the point is, even if DEP never designated this, Newark didn't break the law. That would be, with respect, the State's issue. It's not an allegation against Newark if the State didn't designate it.

And it's a concern for us that they're -- that counsel was unable to point to Your Honor an allegation in this complaint that clearly stated an allegation against the City.

There wasn't anything about that the City's pH --

THE COURT: So if the City goes forward without the proper designation, implements a plan on its own, you're telling me that that decision by the City to do that does not subject them to liability?

MR. KLEIN: I would argue that it doesn't because I would have NRDC suing me, if I were that City, saying you proceeded without the State's designation; you're not supposed to do that.

The City's not authorized to just implement corrosion control on its own. And so if the State didn't designate a plan, well, the City and the State are -- both have a problem from it. But the City didn't do anything wrong.

And it's not within the City's power to just say, I'll take over your job and designate it myself.

And if the City had done that, NRDC would have sued

over that.

THE COURT: Yeah, I don't know if I'm with you there, Mr. Klein. But okay. I understand your argument.

MR. KLEIN: And the point I'm making -- let me back up and maybe take more of a 30,000-foot view.

I am really confident that we've made a good case on harm here. We don't need to win likelihood of success on the merits.

But what I'm hoping is that the Court really now sees that there is a real, live question about whether this complaint meets the basic threshold of a viable complaint. And that's something that the Court should have in mind as well when it's considering its abstention.

THE COURT: Very well.

I'd like to --

MS. WOODS: Your Honor, may I just address two things?

THE COURT: Certainly.

And then, of course, we'll turn to Ms. Heinzerling. Heinzerling.

MS. HEINZERLING: Heinzerling.

THE COURT: Say it again?

MS. HEINZERLING: Heinzerling.

THE COURT: Heinzerling. Heinzerling. It takes me a couple of tries, Counsel, but I'll get there.

MS. WOODS: Your Honor, I just, in all the motion to dismiss discussions, I realized there were two points that I wanted to address from Mr. Klein's closing on the irreparable harm aspects.

First, Mr. Klein described that there's no connection between their 2017 sampling violations and what is happening now.

And I just wanted to clarify that -- a point on that, which is that if they had had the required amount of Tier 1 sites in 2017, the levels would have been -- could have been and likely would have been much, much higher than 27 parts per billion.

So we can't say that they were triggered anyway, so it wouldn't change what's happening now.

If the levels at that time came in at 40 parts per billion, 50 parts per billion, some -- levels at the level that they are now and that now is triggering attention, if those levels had happened --

And those levels are happening now in part because they have enough sites.

And if those levels had happened in 2017, if they had had a complete sampling pool in 2017, there certainly would have been attention.

26 parts per billion in the first monitoring period of 2017 is very high. But 40 parts per billion, if that's

what happened, would have triggered much -- a much faster response. 26 should have been enough.

I met with the City in October of 2017. I sat down with the water department director. I explained our claims. I explained our concerns. I explained that we thought that corrosion control treatment was failing, based on the data and based on our experts.

And we didn't even -- we sent a notice letter in April, several months -- we didn't hear anything -- very little between October --

Our meeting in October, the follow-up after that, we sent them a letter with requests for information. We had agreed to provide for informal requests for information, and in the meeting, they had agreed to respond.

And this is just my characterization, but they had agreed to respond.

We sent the requests. Never received a response. We moved forward with the notice letter. They did not respond to our notice letter.

So the idea that they acted quickly is not correct.

And if the levels had been even higher, I believe that we would have seen a much -- and even higher based on correct sampling practices, I believe we would have seen a much quicker response.

THE COURT: So you concede there was action taken in

2017.

Your argument is that if the levels would have been accurate because they would have utilized the 100 Tier 1 sampling, that you would have had a more accurate reading, which would have shown the true picture a lot more egregious, a reading in the 40s, and that would have prompted immediate -- other action by the DEP? Better action by the DEP?

What didn't you get in 2017 that you say you would have gotten had the readings been higher?

MS. WOODS: Yeah, I mean, I don't --

Your Honor, I don't -- I don't concede that there was action taken in 2017. This is simply a point that the urgency would have been even more clear.

THE COURT: But you've got to tell me, though. What are you saying --

Obviously, there were notices sent. Right? What do you say didn't happen in 2017?

MS. WOODS: They didn't do their -- the Pequannock report on corrosion control treatment, first of all, it didn't come out until October 2018, almost two years after their first action level exceedance.

What was the delay there? That is significant. There is a problem there that it took two years to analyze what is going on.

And not only that, the Pequannock report in 2018, the State had ordered that it should include the Wanaque. It wasn't supposed to be separate. The State ordered that it was supposed to cover the whole system.

And when the Pequannock report only covered the Pequannock, the State wrote to the City and said you're supposed to include the Pequannock; do that now.

I mean the Wanaque. Do that now.

So all of these delays that the State has allowed over and over and over again have led to the situation that we're in right now.

And I also just wanted -- there's one other thing that I wanted to say, which is to address Mr. Klein's statement that the delays on the lead service line replacement are wholly in the past.

That program is an 8- to 10-year program, as I understand it, and the -- the first phase of the program under the Rule was required to be complete within one year of the first action level exceedance, by June of 2018.

And we're now in August of 2019. They started this just a few months ago. They were almost a year delayed. And --

THE COURT: Does the -- and I'm trying to get an answer to this.

Does the violation of not completing the first phase

within 12 months of the reported exceedance level, does the violation, is it like -- is it a violation no matter whether or not the New Jersey Department of Environmental Protection was aware and --

MS. WOODS: Yes.

THE COURT: -- somewhat condoning or sanctioning the delay?

MS. WOODS: There is a notice of violation from the State that also says -- imposes certain requirements on them.

But the rule has its own requirements. Independent of whatever the State says, the rule has its own requirements that the City has to do 7 percent per year.

THE COURT: So by not doing 7 percent per year, is it sort of strict liability?

MS. WOODS: Yes. It's a provision in the rule that says they have to do it. I don't understand how this -- it can just be excused.

And I want to tie it to what's happening today because the program, as I said, is an 8- to 10-year program. So for every year of delay, that's another year that the program is not going to be finished.

And that affects people right now who still have lead service lines in the ground. And those people are more likely to be exposed to lead because their lines are still in the ground if --

THE COURT: So with every passing year, is it a new violation?

MS. WOODS: Yes. That's how it's written.

THE COURT: Okay. So again, what you're saying to me is that indeed, despite the plan by the DEP through that consent decree, the DEP is not authorized to -- they must follow the timeline set by the Lead and Copper Rule?

MS. WOODS: The Lead and Copper Rule controls. And I don't think counsel has given any authority that indicates that the State can just excuse the language of the rule.

THE COURT: Okay.

I'm going to want to hear the positions of both sides as to the points that Ms. Woods is making right now.

MR. KLEIN: May I have just one sentence?

That was NRDC's collateral attack on DEP. The *Baykeeper* case says, in the case of a collateral attack against NJDEP, abstention is proper.

THE COURT: Let me hear from DEP.

MR. KLEIN: We've heard argument that citizen suits are exempt. But *Baykeeper* was a citizen group, an environmental citizen group. It was -- I think it was Raritan Baykeeper. And that was a Clean Water Act citizen suit.

They said, the Third Circuit said a citizen group's collateral attack on DEP is grounds for abstention, period.

THE COURT: Okay.

Ms. Heinzerling.

MS. HEINZERLING: Heinzerling. Got it.

Good afternoon.

THE COURT: Good afternoon.

ARGUMENT BY MS. HEINZERLING:

MS. HEINZERLING: So what I prepared to address for you today were the questions you raised late yesterday in asking for an explanation of how DEP and EPA work collaboratively and what the working relationship is between DEP and EPA.

In particular, Your Honor asked about what EPA's involvement has been since the Newark's action level exceedance in 2017, and what the roles and responsibilities of DEP and EPA have been since the letter was issued by the regional administrator, Peter Lopez, on August 9th.

And that letter is the letter at ECF 241-4.

To answer your questions, I plan to address three main areas. One is the general Safe Drinking Water Act setup between the State and the federal Government.

Two is some general information that I have for you from consulting with my client about how the general relationship works between DEP and EPA.

And third, how DEP and EPA have worked together collaboratively on Newark with regard to the lead action level exceedances.

So the Safe Drinking Water Act, as a general matter, and as you heard through papers and elsewhere, is an example of cooperative federalism, where the State and federal agencies work together to implement a law.

Section 1413 of the Safe Drinking Water Act, which is 42 U.S.C. 300g-2, sets forth a scheme where the State can apply to EPA to be approved for primacy or primacy enforcement authority for the Public Water System Supervision Program, PWSS, if they meet certain requirements, which essentially relate to their authority and wherewithal to carry out the program.

Under the Safe Drinking Water Act, primacy is the responsibility for ensuring that a law is implemented and also the authority to enforce a law and regulations.

As indicated in the State's motion to dismiss, the First Amended Complaint, which is at ECF 110, on August 10, 1979, the New Jersey Department of Environmental Protection submitted an application under that primacy provision, 42 U.S.C. 300g-2, to assume primacy enforcement authority over water systems in New Jersey.

And that's documented in a Federal Register site, 44 Fed. Reg. 69003, November 30, 1979.

That was granted by EPA on that date, the primacy authority.

Where a State has primary enforcement authority, the

Safe Drinking Water Act requires that it have the first opportunity to take enforcement action against a noncompliant water system. That's at 42 U.S.C. 300g-3.

The EPA has to give notice to the State of any violations it might identify in a water system, under Section 300g-3(a)(1)(A).

If the State does not take action after a 30-day notice period, the EPA can then take its own enforcement action.

The EPA is also authorized to act if the State fails to act. You've probably seen that citation on some of the letters exchanged between the parties.

That's at Safe Drinking Water Act Section 1431, which says the EPA administrator has broad authority to act to protect the health of persons in situations where there may be an imminent and substantial endangerment.

It provides that, upon receipt of information that a contaminant that is present in or likely to enter a public water system, the EPA administrator may take any action she deems necessary to protect human health.

The administrator may take action under this section only if the State and local authorities have not acted to protect the public health of persons.

Then, to the extent the administrator deems practical in light of the imminent and substantial endangerment, she

must consult with the State and local authorities to confirm the factual situation and action the State or local authorities are or will be taking.

Actions the administrator may take under this section:

Confirm the factual situation and any action the State or local authorities are or will be taking.

Got it?

Actions the administrator may take under this section include, but are not limited to, issuing administrative orders to persons subject to the Safe Drinking Water Act and, in such orders, to clean contaminated sources of drinking water or to provide alternate water supplies.

Another authority where we see EPA involvement is under the WIIN Act, which is the Water Infrastructure Improvement Act, which is Section 2106 of the Safe Drinking Water Act.

If EPA develops or receives data, including a household's water exceeds the action level exceedance, or ALE, EPA is required to forward the information to the water system and the State.

The water system is then required to notify the households. And if they fail to notify, then EPA is required to consult with the governor and undertake notification of the households.

Section 1442 of the Safe Drinking Water Act authorizes EPA to conduct research studies and demonstrations related to contaminants in the water and is directed to provide technical assistance to the states in administering their public water system regulatory responsibilities.

The LCR itself, just to give a little flavor there where the EPA might get involved, states that the EPA can act to designate corrosion control.

Under 40 C.F.R. 141.82(i), upon receiving the State's treatment decision under the LCR CCT provisions, which is at the citation I just gave you, the EPA, through the original administrator, may issue its own treatment decision if:

One, the State has failed to act;

Two, the State has abused its discretion in a substantial number of cases or in cases affecting a substantial population; or

Three, the State's determination would be indefensible in an expected federal enforcement action taken against the State.

So that's kind of just a broad overview of the relationship there.

In general, the relationship between DEP and EPA, they have a very close working relationship.

EPA monitors public water system compliance data through something called SDWIS, which is the Safe Drinking

Water Information System, a federal reporting database. Laboratories for water systems submit compliance data through E2 data systems, and it gets uploaded to SDWIS nightly.

EPA and the States have access to SDWIS data, so EPA has constant access to all monitoring and compliance data.

EPA Region 2, which is the region that covers New Jersey, conducts an annual review of the Public Water Supply Supervision Program, which is what the primary primacy delegation was for. The last one was performed in 2018.

The intent of that report is to evaluate the primacy agency effectiveness in meeting the objectives of the Safe Drinking Water Act to protect public health. It recognizes successes and recommends areas for improvement.

The annual review process -- sorry, I think I got this out of order -- provides a regular and recurring approach to oversight and ensures that a comprehensive review is implemented across all EPA regions.

The annual review also assists EPA in ensuring that the public water supply supervision program is implemented consistently by each state.

In addition to that annual review, there is also a comprehensive file review evaluation, evaluation the EPA conducts, so into the papers.

They evaluate New Jersey Department of Environmental Protection's implementation of various health-based drinking

water rules. The goal of the file review is to determine if DEP is properly implementing and determining compliance with the drinking water rules in accordance with federal regulations.

Two, to identify discrepancies between the public water system data in the State files and the data reported in SDWIS, that's Safe Drinking Water Information System.

This activity is in support of EPA's enhanced oversight process and is incorporated into the annual review report.

This last file review was conducted in September of 2018.

EPA Region 2 drinking water program and the division of water supply and geoscience, which is a division within DEP, hold quarterly program calls to go over topics of interest, as well as for both parties to provide updates on various issues, drinking water issues, including lead and copper and EPA file review results.

Also on an quarterly basis, EPA Region 2 drinking water and enforcement programs participate in a meeting with the division of water supply and geoscience and the DEP compliance and enforcement staff to discuss the status of water systems with health-based violations and those that show a history of violations across multiple rules.

The division of water supply and geoscience is

required to submit annual reports to EPA, -- excuse me -- including an annual report of violations, among many other reports.

There's a performance partnership agreement between DEP and EPA, which is a grant program in which DEP has made commitments on the system oversight enforcement and compliance.

On Safe Drinking Water Act regulations, DEP actively engages with both Region 2 and headquarters for guidance and the implementation of all rules.

THE COURT: Can I stop you there?

So, and I know I asked you for this, and I appreciate it, but I think I need, in light of what Ms. Woods has said a few moments ago, some clarification on what DEP does when they do receive exceedance levels and what they did.

MS. HEINZERLING: I'm moving right into that right now.

THE COURT: Okay. And timeline for me, because I think that I need to know what happened in 2017.

MS. HEINZERLING: Okay. I'll do the best I can.

So DEP and EPA engage frequently on the Lead and Copper Rule. EPA and Region 2 are provided with periodic updates of systems with action level exceedances.

For the large systems with any special circumstances, they notify EPA shortly after an action level exceedance is

determined. And they get technical assistance on various reports and things from EPA.

As to the Newark situation, before I get into the time, I just want to give you an overview of the various EPA offices that DEP has been working with and kind of explain what their role has been in working with DEP.

So there's Region 2, Region 5, ORD, which is the Office of Research and Development, and then there's headquarters in Washington, D.C.

Region 2 acts a coordinator and liaison for the other regions to headquarters. And they make requests for assistance, respond to questions about the various rules, and consolidate comments from the various regions and headquarters to get back to DEP with advice on various issues.

Region 5 has been consulted throughout this matter. Region 5 is the region which includes Michigan, includes Flint, Michigan, and they have been crucial in providing information about lessons learned from Flint regarding communications, the use of filters, recommendations for flushing. They've also provided technical support by reviewing Newark's documents.

The office of research and development is a scientific research arm of the EPA. In this particular instance, it's not really a regulatory body as much as they're providing scientific support.

So they perform the pipe scale analyses and they provided technical support with review of the pipe scale analyses and have also weighed in on flushing and filters. You heard about the pipe scale analyses through the various corrosion control reports. So they just happen to have the technical expertise to do that. It's not anything special that they called it in.

Headquarters has provided technical support with the review of Newark's reports and participate on technical calls as well.

I should also mention that there is a lab in Edison that's part of Region 2 EPA, which has also provided some laboratory support. Newark had -- again, it just happened to be the lab that they used. The Newark lab in Edison provided the sequential sampling analyses for some of the studies that we've been talking about over the last two days. And so they used the lab there.

So as I noted, there's periodic updates on action level exceedances to EPA. EPA Region 2 began to seek more information more regularly as things progressed on Newark.

And at first, DEP just provided periodic updates and responded to requests for information.

I should note that EPA was provided a copy of the consent agreement and order dated July 25th, 2018. That's in the record at ECF 15-6. And that set forth the schedule for

the corrosion control treatment and the lead service line replacement. EPA never took any action in response to that CAO indicating it was insufficient.

DEP requested technical assistance from EPA once the results of the sequential monitoring at the homes at the Pequannock came in in early October 2018. Those are the results that raised concerns about the efficacy of the CCT in the Pequannock and raised concerns about whether flushing was an adequate lead reduction method in the Pequannock. There were active discussions with the EPA at that time --

THE COURT: Can I stop you there?

MS. HEINZERLING: Yes.

THE COURT: So you said DEP requested technical assistance from the EPA once the results of the sequential monitoring came in, right?

MS. HEINZERLING: Yes.

THE COURT: But that was in October of 2018?

MS. HEINZERLING: Correct.

THE COURT: What happened in 2017?

MS. HEINZERLING: 2017, they were updated on the fact that there was action level exceedances in Newark and they provided information about what was going on at that time.

As to what steps DEP took, they issued what they called at the time a "notice of noncompliance," which was a misnomer because an action level exceedance is really not a

noncompliance, as we discussed here.

So they issued a notice of noncompliance which set forth the beginning stages of the schedule that -- of the steps that Newark had to take once the action level exceedance was triggered. So there's various steps, as we've heard about, that have to be undertaken at that time.

THE COURT: Are there any steps that have to be taken once a notice of noncompliance is issued?

MS. HEINZERLING: Absolutely. I mean, it sets forth -- they have to look at source water. They have to -- there's a schedule set for the corrosion control studies to come in. There is a number of things that were triggered on all those documents. I mean, there's -- yes.

THE COURT: And what happened, does -- did DEP receive that information according to the rule?

MS. HEINZERLING: Absolutely. So the consent order and agreement -- the consent agreement and order -- I'm sorry, I got it backwards.

THE COURT: I always do that. CAO.

MS. HEINZERLING: CAO, which was dated July 25, 2018, memorialized a schedule for compliance that is absolutely within the deadline set by the Lead and Copper Rule. And in many cases it actually exceeds and surpasses the requirements, because Newark agreed to do things more quickly.

The Lead and Copper Rule allows a lot of time to

study these issues because they are very complicated. There are a lot of issues that have to be worked through related to water chemistry and understanding the issues. So the Lead and Copper Rule allows for a period of time for study. So we memorialize the schedule in the CAO --

THE COURT: And you say the schedule was in accordance with the LCR?

MS. HEINZERLING: Yes.

THE COURT: And did it allow for extensions of particular deadlines?

MS. HEINZERLING: No. There's a point I believe of argument from NRDC regarding the lead service line replacement schedule. So to be clear, the lead service line replacement rule requires that when a system owns lead service lines, it has to replace 7 percent per year.

In this instance, the lead service lines are owned by the property owners. They have to offer to replace 7 percent per year.

So that is the -- what is required under the CAO. And, in fact, they have undertaken a lead service line replacement program above and beyond what is required by the rule.

THE COURT: Okay. Continue, Counsel.

MS. HEINZERLING: Okay. So they got technical assistance on the Pequannock.

That's when things started to have a more significant engagement and possibly, probably getting daily updates at this point from that point forward, October 2018, because of the significant concerns raised by the Pequannock sampling results.

So there was discussions about filter efficacy. They relied upon a filter study that was done in Flint at the request of EPA that demonstrated to everyone that the filters were adequate in Flint.

The filter program was ruled out. And the filter program was memorialized in another enforceable order between DEP and Newark called a SCAO, the Supplemental Compliance and Agreement Order. That's dated March 29, 2019, and it's in the record at ECF 180-17.

And as I said, that document primarily memorializes the filter program. And EPA was provided with that document also. They helped DEP in providing guidance on crafting when the filter program should end. And again, EPA never took any action or indicated there were any concerns about the sufficiency of the SCAO.

EPA provided, and continues to provide, technical assistance to DEP in the review of the corrosion control treatment reports for both the Pequannock and the Wanaque service area.

So I do just want to be clear that optimal corrosion

control has now been designated for the Pequannock as of April 25, 2019.

That was --

THE COURT: You say, to be clear, that optimal corrosion control has now been designated for the Pequannock as of April 25, 2019?

MS. HEINZERLING: Correct.

THE COURT: Are you intimating that optimal corrosion control had never been designated?

MS. HEINZERLING: I can't concede that. I don't have a document to show you about past history.

I can tell you that everybody is on track to have corrosion control in place in both of these systems moving forward. The Pequannock, it has been designated. It's going to be monitored. It's going through the schedule set forth by the rule.

THE COURT: Okay. Question for you on -- well, continue. I do have a question regarding, at the end, the DEP's position as to Wanaque.

MS. HEINZERLING: Okay. So it's probably going to be -- my answer is going to have to be it's premature. I will tell you though, because we're talking about corrosion control, that the Wanaque corrosion and full treatment report, final report was submitted to DEP on June 28th, 2019. And that is still under review by DEP in conjunction with EPA. It

has not been formally approved at this point.

But I will note, just because it's a point of discussion, that a draft Wanaque corrosion control treatment report was submitted on February 1st, 2019. And after consultation with EPA, Newark was asked by DEP to take additional steps beyond what was proposed in its corrosion control report specifically relating to ensuring appropriate samples were taken in the potentially blending, likely blending and blending areas of the Wanaque.

So they did receive and consult with EPA on technical assistance on what would be required for studies in those areas.

Okay. ORD, the Office of Research and Development of EPA, did perform the pipe scale analysis for both Pequannock and Wanaque that were in the corrosion control treatment reports and provided guidance and understanding of the results.

As I mentioned to you before, that's nothing special about EPA doing it as the regulator. It's just because they have expertise in that particular area.

And I did mention to you already the EPA Region 2, the Edison lab analyzed the sequential sampling here that's been discussed.

The DEP continues to go to EPA for technical assistance, reviewing documents, reports and data submitted by

Newark really on a daily base.

So since the August 9th results came in on the filters in the Pequannock, DEP, EPA, including Region 2, Region 5, ORD and headquarters, along with Newark and their consultant, CDM Smith, have been in contact daily and they've been, in particular, evaluating sampling protocols to evaluate the filter efficacy.

As you're all aware, the regional administrator Peter Lopez wrote a letter, August 9th, to the DEP. That's in the record. I said it before, that's ECF 241-4. And in that letter there was a request to provide notice to the residents and bottled water.

Nothing has formally changed between the DEP and the EPA since that letter. DEP is still the lead and still has primary authority in New Jersey, but it is an active and continuing consultation with the EPA.

As laid out in Commissioner McCabe's letter, back to regional administrator Lopez, which is located at ECF 243-2, DEP and Newark have taken actions consistent with the letter and have ensured the provision of public notice and bottled water.

August 9th was the first time the EPA called for bottled water. And Newark provided it by August 12th.

The EPA has not conveyed any disagreement with the bottled water program as it currently stands.

To be clear, EPA has not issued any orders. It called upon DEP and Newark to take certain steps, which have been taken.

The DEP continues to work closely with all of its EPA partners on a daily basis to manage the situation in Newark.

THE COURT: So EPA hasn't issued any orders. Newark still maintains primacy -- strike that -- DEP.

MS. HEINZERLING: DEP.

THE COURT: DEP still maintains primacy. And to your knowledge, any orders directed at Pequannock or Wanaque will be issued by the DEP?

MS. HEINZERLING: At this point in time, absolutely.

THE COURT: Now, back to the Wanaque question. You said it's premature.

MS. HEINZERLING: Yes.

THE COURT: So you said a Wanaque corrosion control plan has been submitted to the DEP. That is that June 28, 2019, plan?

MS. HEINZERLING: Correct.

THE COURT: To determine whether indeed that plan will be designated?

MS. HEINZERLING: Yes.

THE COURT: So right now Wanaque does not have, to your knowledge, an actual designated plan?

MS. HEINZERLING: It does not have a document I can

show you.

THE COURT: It does not have a document you can show me. So what we're doing now is, arguably, documenting a designation for both water systems.

MS. HEINZERLING: Right.

THE COURT: So the June 28, 2019, plan has not been ruled on by the DEP, right?

MS. HEINZERLING: Correct.

THE COURT: And the February 1st, 2019, draft that was submitted to DEP was not approved because additional sampling was requested.

MS. HEINZERLING: Right. And that -- it's typical back and forth to submit a draft and then DEP made a request that they expand some of their sampling areas and do various things. So it was their -- it's normal course of action.

THE COURT: Now, based on -- you said in your general presentation, and again, I relied on Mary Jo Monteleone taking those -- I'm hoping to go back to the transcript so I'm going to go off memory here.

But you seem to have suggested that EPA constantly has access to data.

MS. HEINZERLING: Yes.

THE COURT: Through this -- you called it SDWIS.

MR. EPSTEIN: SDWIS, it's SDWIS, Safe Drinking Water Information System.

THE COURT: They have access to it, right?

MS. HEINZERLING: Yes.

THE COURT: And what triggered the August 9th letter by Region 2 Peter Lopez?

MS. HEINZERLING: You would have to ask EPA. I think there had been discussions during the day and...

THE COURT: I guess what I'm saying to you is they were aware of not only the discussions during the day but they had access to all the readings, right?

MS. HEINZERLING: Yes.

THE COURT: So they saw was something in these readings and during those meetings -- those meetings were actually testified to by Mr. Adeem, right?

MS. HEINZERLING: Yes.

THE COURT: Based on that, we had Region 2 administrator. Is that --

MS. HEINZERLING: Yes.

THE COURT: Region 2 administrator Peter Lopez.

MS. HEINZERLING: Yes.

THE COURT: Issued that letter that actually came as a surprise as we heard yesterday by Mr. Adeem to all of those that had participated earlier in their daily meeting, telephonic or in person, I take it.

I guess the question I'm asking is if EPA would have seen numbers in Wanaque that they have access to is it safe to

say that they would have included Wanaque in the bottle distribution program?

MS. HEINZERLING: I can't speculate for EPA, but --

THE COURT: How about for DEP? If the numbers were such that you now have this information coming in, do you believe that if there was a risk to Wanaque residents, DEP would have included them in that bottled water program.

MS. HEINZERLING: DEP certainly has the authority that it could exercise. It has a similar corollary authority to the federal statute and state statute regarding substantial endangerment.

It is certainly closely monitoring the situation, closely looking at the data. As everyone has said here, everyone is very concerned for public health. And I have to rely on what the client has done thus far and what we have in the record here and nothing has been issued by DEP or EPA in that regard.

THE COURT: So the Court can take from the fact that no action has been taken from DEP and/or EPA that would include the residents of Wanaque?

MS. HEINZERLING: No action has been taken.

THE COURT: And that is after you have, presumably, looked at the readings, shared those readings via SDWIS with EPA and monitored the sampling from Wanaque.

MS. HEINZERLING: All that information is available.

THE COURT: And no action has been taken?

MS. HEINZERLING: No action has been taken.

THE COURT: Is it a safe assumption that if no action has been taken, it is -- I know I'm putting you on the spot, but is it safe to assume that if no action has been taken it is because these agencies, these regulatory agencies, of one you now represent, do not believe at the current moment action should be taken?

MS. HEINZERLING: It's a safe conclusion to make that at the moment no action -- that DEP has not determined any action is needed in that regard.

THE COURT: I want to get back to something that you said with respect to 2017 and the notice of noncompliance.

Do you assert here today that the DEP has followed the law as it relates to both SDWA and LCR in terms of your responsibility to certain action or to take certain action once exceedance levels have been determined?

MS. HEINZERLING: Yes.

THE COURT: Or documented?

MS. HEINZERLING: Yes.

THE COURT: And again, the schedule set by that CAO on January 25, 2018, ECF 15-6, you, again, say the schedule is in accordance with LCR?

MS. HEINZERLING: Yes. And that's July 25th.

THE COURT: I'm sorry, that's July 25th, 2018.

MS. HEINZERLING: Yes.

THE COURT: So let me rephrase it.

The July 25, 2018, CAO, which will memorialize the schedule to be followed by the City, you say the schedule to be followed by the City is in accordance with LCR?

MS. HEINZERLING: I believe so.

THE COURT: Thank you very much.

MS. HEINZERLING: Thank you.

THE COURT: Counsel, one more question.

The August 9th letter, does it specify Pequannock and Wanaque or does it specifically indicate Newark?

MS. HEINZERLING: Can I get that for you?

THE COURT: Can we do that?

MS. HEINZERLING: The August 9th letter refers to Newark.

THE COURT: So it refers to Newark. What do I do with that? Because, indeed, I'm being told that the water systems are viewed and regulated by the DEP as one system.

MS. HEINZERLING: That's correct.

THE COURT: As one regulated system, correct.

MS. HEINZERLING: Yes.

THE COURT: I've heard that over and over again throughout the course of the last two days.

MS. HEINZERLING: Yes, correct.

THE COURT: So in the eyes of the law we're dealing

with one system.

MS. HEINZERLING: That's correct.

THE COURT: So when I read the August 9th letter by regional administrator Peter D. Lopez, ECF 241-4, it says Newark.

MS. HEINZERLING: I believe EPA is aware that water is only being distributed to Pequannock residents. The notice indicates, the public notice that went out, indicates distribution centers are in the Pequannock. The EPA is aware and on notice of where the water is being distributed and there's been no direction otherwise.

THE COURT: Thank you. Okay.

Mr. Klein, you stood up a few times. I know you wanted to add some things.

MR. KLEIN: I can't improve on anything Ms. Heinzerling has said.

THE COURT: Are you going to get -- do you now want to address your abstention before I hear from counsel for NRDC?

MR. KLEIN: Yes, I would propose that we have moved for the Court to abstain and therefore, as a proponent of that, the we should go first, unless there's disagreement from NRDC.

THE COURT: Okay. So let me hear you. I will say, though, based on what I'm hearing now, EPA has not taken over.

EPA is leaving it to DEP. DEP maintains the primacy that it has had since the 1990s, specifically 1979.

And so the primacy remains in DEP. EPA is not necessarily assuming any control over the water systems at issue in this case. And therefore, your arguments to me in a conference call earlier this week, I think I have to push back a little because it is not two regulatory agencies that you are contending with. You are contending with the state regulatory agency, the DEP.

CONTINUED ARGUMENT BY MR. KLEIN:

MR. KLEIN: Your Honor, I would only note that it was EPA's letter on Friday that set in motion a dramatic chain of events. That did not come from DEP. It didn't come with any notice from DEP. In fact, it was addressed to DEP.

EPA said, if you don't do this, we will. And Newark did. And that was addressed to both the City and the state.

So we've never said that EPA has taken full control of this matter. EPA doesn't have to take full control for abstention to be proper. I would argue that abstention is proper just because DEP is so involved. I would argue that abstention is even more proper because now two regulatory agencies are obviously sharing responsibility for what's happening here. Both are interested, both are monitoring, both have taken turns issuing orders.

This Court would be regulator number 3. It would not

be the case that EPA -- I'm not -- I'm not arguing that EPA has now established its primacy. I don't think that it has.

Rather, Newark is subject to shared regulation by two agencies and that's a complicated situation. But as Your Honor pointed out on that same call, that means that checks and balances occur. It means that DEP has a slightly different perspective than EPA. They both share information, they push back, they test each other.

I think what the Court has to grapple with is what is the place for the Court in a position like that, in a complicated situation like that?

And so my argument will be about that.

Let me say first, the U.S. Supreme Court has been very clear about the place of citizen suits. So let me quote from *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* For the record, it's 484 U.S. 49 at 60.

Citizen suits are proper only, quote, if the federal, state and local agencies fail to exercise their enforcement responsibility, end quote.

And the Supreme Court was quoting from the legislative history behind the Clean Water Act, but it wasn't specific to the Clean Water Act.

I think it's fair to say that that quote begins and ends this argument. The Supreme Court said citizen suits are only proper if the federal, state and local agencies fail to

exercise their enforcement responsibility.

Can anyone contend with a straight face that EPA and DEP are not exercising enforcement responsibility after the presentation that Ms. Heinzerling just gave where she spent, I don't know, 25 minutes detailing the exact detailed communications and efforts and information sharing. I couldn't take notes fast enough to cover it all. It was a blizzard of details about how involved both of these agencies are.

And yet to win, NRDC -- to win against essentially the U.S. Supreme Court's language, NRDC has to prove that these federal, state and local agencies are failing to exercise enforcement responsibility.

I don't see how that argument can be made with a straight face at this point.

So maybe apart from that, there's some agreement between the parties on what the law is here that governs. So in their briefing NRDC often will say the Court has very broad equitable powers. We don't disagree.

I'll note as a side point, Chief Judge Linares at one point I said to him something that suggested that I thought the Court's jurisdiction might be limited. And he bit back very strongly on that point, no, the Court's powers are very strong. I won't argue with that.

I think we agree here that the Court has significant

equitable power. We also agree that the Third Circuit has left this Court a lot of room to, first of all, to fail -- to decline to enter an injunction. The *Trinity* case that we cited in all the briefs affirmed a New Jersey District Court's decision not to enter an injunction because they said the agency is already doing what can be reasonably be done, so I'm not going to enter an injunction. And the Third Circuit said fine.

So it's clear that this Court has the power to say no injunction because DEP and EPA are doing what has to be done.

It's also I think beyond real argument that abstention on the grounds of primary jurisdiction exists. It is something that happens it happened in the Third Circuit. As we've said, the *Baykeeper* case is an example. They brought a citizen suit, the defendant said you should abstain, the Third Circuit went through a four-part test, and they ultimately said you didn't meet the test. If you could show that you were collaterally attacking the DEP, then abstention would be proper.

So that can't be reasonably contested.

THE COURT: But in that case, the DEP had not been involved for like seven years, right? I mean, that would have been --

MR. KLEIN: Yes, that's exactly right.

THE COURT: But what am I doing, I guess, with Flint

and the decision out of Flint? Because I have to tell you, again, I understand it's not binding on me, but it's persuasive. And the judge in that case looked at this exact argument that was brought in, I think a motion to dismiss actually.

MR. KLEIN: Which argument?

THE COURT: The abstention argument was brought before the Court and, you know, the Court didn't abstain in Flint.

MR. KLEIN: The difference, Your Honor, is there was no Kristen Heinzerling who could recite for 20 minutes the thorough details that MDQ and DEP were doing in Flint. In fact, in Flint the problem was that those agencies were not doing what they should have been doing.

And we now live in a post Flint world where DEP is terrified of being the next MDEQ. EPA is terrified of another Flint. They are tripping over themselves to make sure that Flint doesn't happen again. And so Flint is not the right precedent here.

In Flint the Court may have been needed as a backstop where the agencies were, as the Supreme Court said, failing to exercise their enforcement responsibility.

And now, Judge Lawson's decision in the Flint case doesn't have a section about, you know, the State is present or their not present. They weren't present.

And in fact, they were defendants in that case not because they were regulators like DEP. They were defendants because through complicated arrangements, they essentially had been put in charge of the City of Flint. They were the municipal government of Flint at that time.

The State, it was a receivership or something like that. The State was running Flint. And in that capacity, they were sued directly as a defendant. They were Flint.

Here DEP is not Newark. DEP is a regulator. So it's very different. This issue was not tested in Judge Lawson's opinion. So we don't think it's valuable even as a precedential decision.

THE COURT: But one of the things that you have argued in your papers and during our conference calls this week, you talked about the potential for conflict. And one of the things that we know that Judge Lawson concluded is that the relief sought in Flint was both similar and different than what had been ordered by the DEP, but not conflicting.

How does the City distinguish the relief sought in this case as opposed to the relief sought in Flint? How do you reconcile it, I guess I'm asking?

MR. KLEIN: I think the difference is that Ms. Heinzerling essentially just stood up and told you that DEP has made a judgment that bottled water is not required at this point in the Wanaque. If Your Honor decides differently,

Your Honor will be countermanding a DEP regulatory determination.

Now, maybe that's warranted and maybe it's not. I would argue that it is not in the spirit of citizen suits, as the Supreme Court has said, that when agencies are making these kind of determinations that courts should second guess and countermand them.

There could be very good reason why DEP wouldn't want Wanaque water delivered. In fact, we've heard that those reasons in this case, there could be a lot of detriment to delivering bottled water in the Wanaque. And it's, I think, it's very plausible -- in fact, it's very plausible that DEP had just those considerations on its mind when it decided not to require Wanaque bottled water delivery at this time.

But that decision would have been made by DEP on a factual record that is far richer than this Court has. We have had one day of testimony. The NRDC brought one expert witness and a cost witness and that's all the Court has.

DEP's sources of information about things like what would be the consequences of this, what would be the impact precedentially in other New Jersey water systems, where would the water come from, how long would it last, do we risk running out and scaring people, do we risk taking it away from the Pequannock that might need it because there's a limited supply.

Those are all things that are not before the Court. The Court simply lacks information to consider all those factors. The DEP does. And that is why the Supreme Court says citizen suits are for when regulators aren't doing their jobs. That's the history of citizen suits. They were first used in the civil rights era.

The concern being that many states in the United States would not enforce civil right lawsuits, so these citizen suits provisions were written into civil rights law so that, you know, someone wouldn't just be out of luck say because a former confederate state decided it didn't want to enforce civil right laws. And they migrated their way into the environmental laws in the late 60s and early 70s for the same reason. And they do a lot of good. They do a lot of good.

But the potential for overreach is real. And that is what is happening here. A citizen suit is trying to be used not because DEP is absent or EPA is absent, because the clearly are not. We just heard that they are not absent.

The NRDC is using the citizen suit provision here not because DEP was absent, but because they disagree with how DEP is doing things.

THE COURT: That is something that concerns me because, and this is what I wrestle with, if you look at Page 51 of the plaintiffs' moving brief, they seem to take

issue with what the compliance agreement orders have set forth. They say it permits unlawful extensions of regulatory deadlines, allows for incomplete submissions and mandatory documentation, excuses Newark from paying the required -- from paying for required infrastructure improvement, sets a protracted schedule for the abatement of lead in the City water, does nothing to enforce the obligation promptly notifying residents in the future beyond including regulatory language that the City has repeatedly flouted.

So those are just some of the excerpts I pulled from Page 51 into 52 of the moving submission.

And here is something I struggle, and obviously everyone, including Mr. Epstein, is going to have to explain to me. It does feel as if this citizen suit is trying to step into the shoes of what the DEP is doing. It doesn't like the schedule, it doesn't want the schedule, and it almost wants this Court to throw out the CAO and impose different deadlines. Which then I do say I am uncomfortable with, because that does seem to be something more than necessarily the judge, Judge Lawson was dealing with in Flint. But I should note for the record there was an EPA order in Flint already in place.

So, you know, I know what you're saying that they were arguing that the EPA and DEP weren't involved in that. The EPA had issued an order in Flint. And in fact, the

argument in Flint, as I understand from the opinion, was that the defendants were saying, in Flint, the defendants were saying that they were trying to appeal an EPA order that should have gone to the circuit and not to the district judge.

These are factual differences in our cases. But I am uneasy with what I'm reading in Page 51 and 52 because it does appear like the plaintiffs are saying, We don't like the CAO, we want you to -- we want you to mandate earlier dates, faster dates, different notices. And is that not then in direct conflict?

MR. KLEIN: And not just those. The supplemental CAO, the SCAO, sets out the parameters of the filter program. That's what the supplementation largely was about.

And NRDC doesn't like that either. They have an injunction motion about filters should be done and it's different than the SCAO. How long it lasts is different. The exact requirements and who gets filters is different. There's a conflict. It's inevitably a conflict.

Now even if -- I know that Mr. Epstein will come up here and say to order extra relief is not a conflict.

THE COURT: Well, but extra relief is different than, Judge, bypass the schedule and make it sooner.

MR. KLEIN: That's my point.

THE COURT: That's a conflict. And Mr. Epstein is going to have to tell me how it's not a conflict.

MR. KLEIN: The problem is even if NRDC says, you know, they wanted you to deliver 10 filters and want you to do 15, so you can comply with both. The problem is, if the DEP feels that it has the authority to order things like the number of filters delivered, the moment this Court says no, no, I say it's 15, what does DEP do the next day?

Who is Newark supposed to call the next time it wants to talk it out? Which, as Ms. Heinzerling explained, those types of calls happen -- and Mr. Adeem, those types of calls happen every day. And these things are negotiated.

And so when DEP says only 10 and not 15, they did that for a reason. And if this Court says, well, 15 is just more, so you can comply with both, the problem is that will be the last decision DEP ever makes about this case because now it knows where the power is. It doesn't have anymore room to make these kind of decisions.

And so the Court, by entering such an order, essentially impairs, mutes, boxes out the regulators that have far more information and can act far more quickly. That is why the Supreme Court said, and Congress itself in its explanation said, these are four cases, these citizen suits are for cases where regulatory enforcement is not happening. They don't work where regulatory enforcement is happening because inevitably it comes a turf war between a federal court and a regulatory agency or two regulatory agencies.

And that just isn't going to work. It practically, realistically is not going to work here. Because if Your Honor enters these kind of orders, how will Newark ever be able to call its regulator again? It will have to call Your Honor, your clerk.

I don't know. I don't understand how that will work. And that's why the Supreme Court couldn't have been more clear. It's not how it works in a citizen suit. It's not meant to be a competing source of authority with regulators.

And the list you read from Page 51 is just partial.

Now, I'll remind Your Honor of something that the Court knows very well.

For a long time in this case, the plaintiffs were unhappy about the 15 part per billion lead action limit. They wanted it to be 10. They said the WHO calls it 10, many states call it 5. You know, the Court should set 10 in Pequannock because that's in between zero and 15, and that will protect health better.

That's a collateral attack on regulation. And we can't do it that way. It will not work, and the law doesn't allow it.

THE COURT: And I made myself abundantly clear that I was not going to entertaining that argument by the plaintiffs.

MR. KLEIN: And that's exactly right.

But if the Court stays on this case, you're going to have to continue to make yourself clear about a lot of things like that. It's going to be a constant conflict between what NRDC thinks is best and what DEP thinks is best. And the Court will be the mediator. That is not how this is meant to should work.

And if it were, who's to say that NRDC would be the last citizen group to try this? Why can't the Sierra Club come in and have a slightly different view? They can file a citizen suit too.

Why can't a local, a Newark Education Workers Caucus or a Newark clean water action group file a citizen suit too, with a slightly different idea about how this is supposed to work?

That's why the law says no.

It's not just a matter of you have to do it because the law says no. To not do it actually hurts the people of Newark because the people of Newark benefit from DEP's greater experience, greater resources, greater ability to act quickly.

DEP has dozens of people working on this, many of them probably as a full-time matter. They can act quicker and with better information than this Court, because as we've all seen it's not easy for us to get to an injunction hearing. We tried for one back in the fall and it was muted by events

because the filter program started.

THE COURT: Well, and I think that's something, quite frankly, I'm interested in hearing, Mr. Epstein, on as well. You know, this is -- this whole process is in flux. This whole -- I mean, everything to, again, point to Mr. Adeem and his testimony, which he basically said things change, things are changing every minute on the hour.

So we're meeting in the mornings and we're talking at night, et cetera.

In fact, as you pointed out, we were ready to have an initial hearing and the filter program and the -- it became an issue in terms of a roll out. And indeed I put that off and ordered new briefing. And now on the eave of this hearing we had the August 9th letter from the EPA that --

MR. KLEIN: Exactly.

THE COURT: -- now changed the landscape of what's before the Court.

MR. KLEIN: They wanted it in 45 days.

THE COURT: What I suspect is once we hear the results of now then the survey that's on its way and being investigated with respect to the efficacy on the filters things are going to change. Arguments are going to likely change, or maybe not.

But there is a concern that I have and I'll put it out there, counsel, that I almost feel as if, if I don't

abstain, there is a sense that perhaps a stay is in order to allow the regulatory process to play out.

MR. KLEIN: And in fairness, Your Honor, a stay would be a form of abstention. When the case law says that if Your Honor abstains, it can do so by stay or by dismissal out prejudice.

THE COURT: I'm less inclined to a dismissal. And by the way, I'm not calling this today.

But I think it's always best to allow the parties to hear my thoughts. You've seen me do it in conference calls. I've given you my feelings.

Obviously, this is, right now, we're in the thick of it in terms of the regulatory agency now, DEP, along with consultation and collaboration with the EPA daily, that I've just now heard. Right? Where they are sharing information and EPA is checking the SDWIS. They are stepping in when they feel they need to step in, they haven't been shy about it, they've done it.

They've done it even when they thought they had an agreement. And Mr. Adeem said the next thing you know there was no agreement and we have a Region 2 administrator saying, you know what, never mind, we're going to do this now.

So clearly we have regulatory agencies that is are awake, are monitoring this, and are, you know, obviously, addressing the issues as they come up.

It is not a situation, as in *Baykeeper*, where we had an agency that hadn't been involved for seven years. And so I am very concerned that this Court needs to allow, in some way, the regulatory agency in this case, DEP to do what DEP is doing in monitoring, along with consultation and collaboration with the EPA.

There is, you know, a great concern I have.

The flip side of that is, and I'll tell you the flip side of that. The flip side is that I don't like not having the information that I need to have, like is there a designation document or not. I would like to know. If there's not, I need someone to say there's not. Right?

I don't like that I hear that this is -- you know, that bottled water was distributed that may have been -- not an expiration, but a best used date that had expired.

I don't like to hear, although I think it's wonderful that the City of Newark is not turning away pregnant women waiting on line for bottled water, there is clearly not a written policy in place necessarily that anyone is following and that it is constantly changing.

I don't like to hear those things because those things make me feel like perhaps we all don't have a really good handle on what's coming and maybe the Court should be here as a backstop if and when it becomes necessary.

MR. KLEIN: So may I respectfully push back a little

on that?

THE COURT: Certainly.

MR. KLEIN: It is true that there appears to have been some kind of issue with best buy dates on water. I read that in the news. I haven't spoken with my client about it. Can this Court act faster on that than DEP? That would be the problem. Because we would have to come to this Court to deal with that instead of letting DEP immediately solve it.

And as to the concern of, you know, as Mr. Adeem said we don't have a written policy for who can have water in line, this situation is five days old and it's still being worked out.

But there's a practical consideration there, and I want to choose my words carefully here, because -- I hope the Court will understand what I mean when I say this.

THE COURT: Please.

MR. KLEIN: The fact that Mr. Adeem has had to be here for two days slowed down getting that document written. And that is a microcosm for what has happened for the past year. The employees of Newark have been devoting a tremendous amount of time to this case and it has taken them away from dealing with their normal duties, including dealing with the DEP.

THE COURT: But, Mr. Klein, I could turn that right back on you and say that because of this suit we had Mr. Adeem

send out his top water -- what was the title for Mr. Ewtaroo?

MR. KLEIN: Your Honor, that's actually factually not correct and I would like to correct that record.

THE COURT: Well, the record is there. What do you mean?

MR. KLEIN: No. The City had agreed to look into the blending issue before NRDC knew about it. NRDC learned about it because they got a letter from Andrea Adebowale. The City was doing it of its own accord --

THE COURT: What I have what Mr. Adeem said, right, and Mr. Adeem clearly said that because of the litigation and there was some indication of blending, he went out and he basically sent out someone to go -- the top water distribution, Paul Ewtaroo, went out and began to then physically close the gates --

MR. KLEIN: With respect, Mr. Adeem misspoke on that and we can invite him back up to the witness stand. The blending issue was started by DEP. DEP asked the City to consider blending. And Andrea Adebowale, then the director responded yes, we will in a letter. It was when NRDC got ahold of that letter --

MR. EPSTEIN: I object to new evidence being put in by counsel.

THE COURT: I agree. Counsel, I mean, there was an opportunity to redirect your witness yesterday. If you wanted

to redirect your witness, you should have. Let's not now go down this road. We can be here all day going back and forth.

The reality of this situation is I have a big decision to make and I am not going to make it today as to abstention. But I am going to tell you that, both sides, I am very concerned because there are cases like *Harding-Wright* that clearly the Court in that motion to dismiss did, you know -- abstained. And while it, in fact, granted, in part, the motion to dismiss because the Court found that fashioning an interim mediation plan independent of what the EPA had already required was better left to the expertise of the EPA.

There are -- there is -- there are instances and there are cases, on both sides. Flint being one that's not in your favor. I think *Harding-Wright* being not in the plaintiffs' favor. There is a lot for this Court to consider and not a great body of law for me to rely on, regrettably, but there is at least some indication that the regulatory agencies in this particular case are involved, have been involved, and are involved on a daily basis.

I have a hard time reconciling what I could do that the DEP and EPA are not already doing. Without it being in direct conflict if, indeed, what the plaintiffs are going to start asking this Court to do is change timelines.

MR. KLEIN: Let me give two examples and then I will sit down.

This whole situation since Friday came about because DEP ordered the filters to be tested, NRDC didn't ask for that and they never have raised the possibility that filters wouldn't work. It was the agency responsible for --

THE COURT: In fairness, they were raising the problem that if there weren't proper instructions, they weren't being monitored, there wasn't someone helping with installation and they honestly wanted people to go back within weeks to confirm proper installation. There was a lot they were asking for.

MR. KLEIN: No, no, no. I don't dispute that.

THE COURT: I don't want you to surmise that they were saying this could happen if installation isn't done correctly.

MR. KLEIN: I don't dispute that. But what is also indisputable, if NRDC had been the regulator instead of DEP, these filter problems on Friday wouldn't have been caught yet. That was DEP.

And I will give you one more example and then I promise I'll sit down.

The bottled water issue, it was the New Jersey Department of Health that jumped on that. That was a regulator stepping in to do its job. It wasn't NRDC or the Court that caught that. And it's -- I don't understand how the Court could. The Court has so many other things to do.

And it's not clear to me how it can be monitored.

THE COURT: But we have -- time and time again, the Court has been asked to come in on very complex matters and to regulate and to participate in remediation efforts, time and time again.

I myself, both as a magistrate judge and a district judge, have been involved in incredibly complex environmental cases and it is obviously not ideal, but when the circumstances require it, the Court must do it.

MR. KLEIN: And I agree with Your Honor. And to be clear, it's not the complexity, because there are some extraordinarily complex environmental cases. That is what we do, Ms. Reddy and I. And in fact all of us from Beverage & Diamond, that's our practice. So we know how complex environmental litigation can be.

It's not complexity. It is speed and attention. And remediations of site cleanups are not by their nature necessarily as fast moving as this. This is different.

THE COURT: Understood.

Mr. Epstein, a lot to respond to.

Let's take a 10-minute break.

THE DEPUTY CLERK: All rise.

(Recess at 3:20 p.m. to 3:45 p.m.)

THE COURT: Okay, Mr. Epstein. Your turn.

MR. EPSTEIN: Thank you, Your Honor.

THE COURT: Everyone please be seated.

MR. EPSTEIN: I appreciate it.

ARGUMENT BY MR. EPSTEIN:

MR. EPSTEIN: Your Honor, I'd like to just begin briefly to respond to one point that city council raised before we broke, which was that it is unfortunate that the City employees have had to take time to participate in this litigation. We agree with that. And it is a shame that Newark decided to litigate this case, because we didn't.

We came in in 2017 and we told them there were big problems going on with lead in water. We continued to tell them and they did nothing. We told them again in 2018 and they did nothing. We sent them a notice letter and they did nothing.

So the reason we're here today, let's be really clear about this, is because the City of Newark has decided to be litigious. That's their right, but don't come in and complain that their employees have to be involved.

Now, Your Honor, on to abstention. It's been black letter law for four decades since the Supreme Court's seminal decision in Colorado River, the courts have a virtually unflagging obligation to exercise the jurisdiction that is given to them.

In the only request for relief that is before the Court today, NRDC and Newark Education Workers Caucus have

asked for a targeted exercise of judicial power to order that an existing bottled water program be extended to two additional categories of particularly at risk residents.

And respectfully, Your Honor, it would be an unprecedented abandonment of the judicial function for a court to decline to adjudicate that request under the circumstances of this case. And here is why.

We have cited case after case after case, including binding Third Circuit precedent, which I will get to, that state that when a private plaintiff in this context seeks relief, it goes above and beyond an agency order, even when there's an agency order, you seek injunctive relief, it goes above and beyond that, you can't abstain. That's not a basis for abstention.

And here it's a doubly strong argument because, as we just heard, there is no EPA order. We've got consulting, listening, helping, talking, meeting. There's no EPA order of any kind here.

I want to be very blunt, as I was on our conference call earlier this week, this isn't a close call on the question of abstention. And here is why.

Because *Baykeeper* is binding on this Court. And I can't figure out what just happened, if there is a parallel universe *Baykeeper* case or there's going to be an apology coming. I really don't know.

But what you heard about *Baykeeper* is really not what that Court held whatsoever.

What *Baykeeper* held is that it's reversible error for a trial court, in that case the District of New Jersey, to abstain on the basis that the relief the plaintiffs were seeking went above and beyond what an agency was doing.

That's reversible error.

I want to keep repeating that because everything that you're heard from the City, all the fear mongering, all the exaggerations about the collapse of the administrative state and regulation as we know it in this country, if the Court dares to be a court, it's nonsense and it's wrong under Third Circuit precedent.

I actually could sit down now and say, read *Baykeeper*, stipulate --

THE COURT: I don't think so, counsel.

MR. EPSTEIN: Yeah. Well, I'm going to pile on because the Court had concerns were abstention, so I will pile on.

Point 1, courts have refused to abstain in cases where regulatory agencies were far more active than the EPA or even DEP has been here.

We've cited cases where EPA had actually entered remediation orders and said, this is what you have to do to fix the problem. These are all the steps you have to take.

And yet when the private plaintiffs came in under citizen-suit provisions, abstention was inappropriate because the private plaintiffs were asking for relief above and beyond what the agency had ordered.

This Court mentioned the Flint case yesterday. Both the state agency and the EPA were already involved in oversight and actual orders in Flint when the Court issued its injunction. And there are many other cases where abstention was held to be improper. Even though the agencies were way more involved than they are here. And I'm going to talk about some of those.

Interfaith Community v. PPG, Judge Greenaway of this court, New Jersey DEP had entered into a consent agreement with the defendants. Sound familiar? And had ordered remediation, but not as far as plaintiffs wanted. No abstention.

Baykeeper, EPA had ordered a cleanup. New Jersey DEP had entered into an administrative consent decree. Sound familiar? Both agencies were involved with abstention by the District Court in *Baykeeper* was reversible error.

Point 2. Courts refuse to abstain in cases involving much more complex technical issues than are presented in the instant motion. Those cases involving the cleanup of toxic sites are deeply, deeply complicated in terms of hydrology and biology and engineering and what solutions should be done.

The issues in front of the Court in today's motion are nowhere near complex as the scientific and engineering issues in the toxic cleanup cases.

This Court talked about how busy it's patent docket is. Those cases present all kinds of technical and scientific issues which courts deal with.

And I really love how the First Circuit in the Maine People's Alliance case dispensed with a similar argue. It said that the defendants were trying to sell the judiciary short, and that's what's happening today.

The court in Maine People's Alliance said courts all the time are called upon to evaluate expert testimony in environmental cases. And this is an important point. Doing so is not in any way tantamount to a court becoming a policy maker. The court is just doing what courts do, hearing witnesses and weighing evidence.

And there's a very important related point that I want to emphasize which was made in both *Baykeeper* in the Third Circuit, *Interfaith Community Organization* and this Court.

These courts say it would be counterintuitive to suggest that, in a statute with a citizen suit provision like we have here, that courts have to defer because agencies are involved.

That's the whole point of citizen suits. That's why

Congress created citizen suits. If you create it in an environmental statute, you know by definition that the agencies are involved.

And yet Congress decided there could be citizen suits, and the Third Circuit decided that plaintiffs absolutely can ask for relief that goes above and beyond what the agencies --

THE COURT: The relief that you're asking, Mr. Epstein, now, you argue, is above and beyond and not in conflict?

MR. EPSTEIN: 100 percent, Your Honor. The motion before the Court today is about extending a bottled water program that already exists to additional at-risk residents. There is no order out there from any agency that remotely conflicts with the relief that we're seeking.

THE COURT: With respect to the matter before the Court now, I would agree with you that there, at least, does not, although counsel said it would be in conflict.

You say it's not in conflict, it's above what is already in place.

But with respect to some of the -- the complaint and the moving brief, there is, at least, indication that you take issue with what the DEP has ordered in the CAO, correct?

MR. EPSTEIN: There, we absolutely take issue with what the --

THE COURT: And would you, in litigation in terms of the Court's future motion to dismiss, would there be -- would there be request by this -- by you to necessarily accelerate timelines?

MR. EPSTEIN: We need to deal with what we're requesting today. What we request tomorrow will depend --

THE COURT: Let's treat this as a preview of any, if there is --

MR. EPSTEIN: Okay.

THE COURT: -- of a future motion to dismiss. Which I may not have.

So take the time and answer my questions now because I may be dealing on the papers.

MR. EPSTEIN: Sure.

THE COURT: So my question to you is, when I read Pages 51 and 52 of your brief, there seems to be issues with the timeline as outlined in both the CAO and the SCAO.

And I'm asking you, sir, is there -- is there a possibility that relief would be or the relief being sought would be to accelerate timelines.

MR. EPSTEIN: There is a possibility in the future that we will ask to accelerate timelines, which would not be a conflict with any order.

Baykeeper, Third Circuit, explains what it means to have an actual conflict. They gave an example in that case.

THE COURT: Why don't you enlighten me.

MR. EPSTEIN: The example they gave of an actual conflict said if an agency says, in order to comply with the law, you -- in order to remediate a situation, you must turn on this particular pump aquifer, you must turn this one on, we're requiring you, and if a Court then comes in and says you absolutely cannot turn on that pump aquifer, that's an example of something that could be a direct conflict.

And I should add that *Baykeeper*, *Maine People's Alliance*, *PennEnvironmental v. PPG*, all say you can't abstain based on speculative future hypothetical conflicts.

Point 3, defendants argue that additional bottled water eligibility would be burdensome.

But as the courts have said in *HoltraChem* in the District of Maine, additional burdens have nothing to do with the abstention doctrine. An additional burden on a defendant is not an excuse for abstention, as the *HoltraChem* court held.

And again, relevant to this whole idea that the administrative state is going to fail if this Court acts as a court, the Court also said that an additional obligation is not incompatible with nor does it undermine an agency-driven process.

So yet another court saying that going above and beyond what the agency is doing or not doing is not a basis for abstention.

I want to briefly address, because I think the Court had less question about this in our conference call, but at least briefly address this question of the equitable powers of a Court.

I think the Court said it was less troubled by -- if the Court doesn't need additional argument on that, then I will not waste its time. The law there is clear-cut.

The only point I'll quickly make is that in order to mitigate harm, a Court, in its equitable powers, is absolutely not limited to saying, well, you have to fix just this one particular regulation violation.

A Court can do whatever is needed to mitigate the harm. *Atlantic Salmon*, *Southwest Maine,* and *Dayton* and many other cases establish that.

In short, Your Honor, the case for this Court to abide by its unflagging obligation to rule on a dispute before it is open and shut. And the importance of this Court fulfilling its functions could not be more important than in a case involving public health and safety.

When we look at this case, this is just a classic case for limited, targeted injunctive relief to protect the health of the most vulnerable citizens, on a short-term basis, until a separate problem is figured out. And that's all we're asking for.

Now, I want to add one point about this question of

who the most vulnerable residents are and the limited relief and the modest cost we're talking about.

I know there was some discussion earlier in the day about pregnant women or women who are nursing.

But the evidence in this case, including statements by Newark itself, is that small children, infants, small children are equally, if not more, vulnerable to the effects of lead in the water as pregnant women.

This is a really important point because the science says, unrebutted, that when you have an infant who is drinking formula from tap water, that tap water is such a large percentage of what that infant is ingesting that the health danger is so acute, the danger to brain development, during that critical period of development of the brain, up until six years but particularly those first few years.

And I want to read from something that Newark put out. This is Joint Exhibit 16. It was one of its public information mailings: The greatest risk of lead exposure is to infants, young children and pregnant women. Scientists have linked the effects of lead on the brain with lower IQ in children.

And it goes on and on, as does our expert testimony on this point.

And so when we're weighing the equities in this case, as we do in a preliminary injunction motion, there is a real

risk of harm in the short term.

No one could tell this Court that we're certain and we're confident that the chemicals on these pipes is going to be effective over the next three months. There is a high risk of that.

The high risk of that compared to this small cost of extending an existing program to vulnerable residents, it shouldn't be a close call.

Even if we don't look at money at all, let's look at the social costs of another generation of kids, another group of kids getting lead poisoning, getting excessive levels of lead. When it can be avoided for less than $270,000? And it may not even be that because a number of companies have come forward and generously agreed to donate bottled water.

I mean, the balancing of the public interest here is --

THE COURT: But I don't get there yet without irreparable harm, Mr. Epstein. You know that I need to find both a likelihood of success and irreparable harm. And the burden is on the plaintiff. The burden is on you to establish irreparable harm.

And I have to say, Mr. Epstein, that, quite frankly, with the testimony the Court has received in the last -- as of yesterday --

And I'm not going to have you reargue irreparable

harm since Ms. Woods did a very good job in arguing the points that needed to be argued on your behalf. I don't get to the other factors if I don't get past irreparable harm.

MR. EPSTEIN: Irreparable harm is important. And if -- can I do a 45-second overview? If you don't want me to, I won't.

THE COURT: You can, Mr. Epstein. But I can tell you right now, we spent a lot of time on irreparable harm. And in fact, I said a one-day hearing, and we are now here at 4:03.

And I have given the parties all the time that the parties have needed, not only leading up to yesterday's conference and today's, but earlier conferences in which we were on the phone for hours on Monday and on Tuesday.

So I am doing my best in trying to give you all the platform that you need as well as the opportunity that you need to establish your burden, and I am letting you know now that irreparable harm is a problem for the plaintiff.

MR. EPSTEIN: Then I'd very much like to address that briefly, Your Honor.

We agreed that, because we have such voluminous papers in this case, we're not going to trot out 12, 14, 15 witnesses just for the live hearing.

And when this Court looks at the written testimony by the foremost expert in lead exposure in the country, the only lead health expert in this case, that testimony says that at

lead levels that we've stipulated to in this case and even lower, there is serious irreparable injury to the brains of infants and small children and that injury accumulates over time.

We are not starting fresh today. We have infants who have already been ingesting lead in the water, and there is a serious risk that in even three months' time there is brain injury to those children. And how can we sell them short for $270,000 or less?

If I could just look through my notes, there are a couple of miscellaneous points.

The other side keeps citing *Trinity*, the *Trinity* case. It's not a primary jurisdiction case. It's an injunction case.

THE COURT: I read it.

MR. EPSTEIN: Yup. Plaintiffs couldn't even say what additional relief they wanted.

I think the Court knows that Congress itself defined when agency action can displace the Court's jurisdiction. They have to have actually filed a suit, right, filed a suit and be diligently prosecuting the suit. We don't have any of that today either.

THE COURT: What do you say of *Harding-Wright*?

MR. EPSTEIN: Yes, Your Honor. So, of course, the Court in Flint distinguished that case and ruled against it.

THE COURT: But I'd like you to address it.

MR. EPSTEIN: Yes. It is wrongly decided and not valid under Third Circuit precedent because the Third Circuit clearly holds that you can ask for relief above and beyond what an agency is doing. And if you abstain on that basis --

THE COURT: But you're not asking for relief above and beyond. You are asking for different relief. You are asking --

We now know that what the DEP ordered was that Pequannock, water bottles should be delivered for the individuals in Pequannock with lead service lines who received filters.

You are not adding -- this is the way we can see it. You see it differently, I see it differently. Perhaps the Third Circuit will tell me if I'm wrong.

And I'm not saying I'm abstaining. Let's be very clear. I'm going to call the preliminary injunction that's before me. I am going to call it. And it may not be a call that necessarily is going to be a big surprise to anybody based on the evidence that's before the Court.

With that being said, in the long run, I have a motion to dismiss that I need to deal with.

And you are correct, though, that the remedy that you could be asking for, which is for an expedited timeline and schedule, is -- has not been asked for. And, quite frankly, I

could not and should not abstain on speculative grounds. I understand that.

But you are saying -- and I understand what you are saying. But I do think that there are two ways to look at this.

You are asking, you say, for merely above and beyond, which is to extend the water bottle program to the residents of Wanaque that are most in danger, that being pregnant women, women nursing and children under the age of six. I understand that's your argument.

The flip side of that argument is that you are asking for a remedy that is different than what has currently been ordered by the DEP and the EPA and that is in conflict. And you can tell me why you think it's not in conflict.

MR. EPSTEIN: And that is where we differ, Your Honor. Because either above and beyond or different, under *Baykeeper*, and I'll cite multiple other cases -- *Community Organization* case, *Maine People's Alliance*, *Interfaith Community*, the *Flint* case -- above and beyond and different is not conflict.

The two orders are not irreconcilable. They can comply -- first of all, there's no order, so I have to assume there's an order.

They can comply with the idea of passing out water bottles to Joe and John and Mary, and at the same time comply

with an obligation to pass out water bottles to Phil and Susie. They're not incompatible. They can comply with both.

If the Court has no further questions, or I would be happy to answer any.

THE COURT: I have no further questions.

MR. KLEIN: Judge, I am mindful we are all getting a little bit fatigued. I would like to speak for just a few minutes.

THE COURT: No problem.

CONTINUED ARGUMENT BY MR. KLEIN:

MR. KLEIN: There's been a lot of talk about *Baykeeper* on both sides. Let's just read from it.

Third Circuit --

THE COURT: I'm being told that if I were to abstain, I'd be reversed, and I'm being told it's reversible error for the Court to abstain in this case.

MR. KLEIN: Let's hear what the Third Circuit says about that.

The Third Circuit did find that in *Baykeeper* the four factors were not met, and so it did not -- it did not support abstention in that case.

Here's what they said, and this is what we were referring to earlier:

Here, by contrast, *Raritan Baykeeper*'s suit does not amount to a collateral attack on a NJDEP decision nor does it

seek a remedy that necessarily conflicts with an agency order. Accordingly, this is not one of those exceptional cases that calls for primary jurisdiction abstention.

Now, I don't think it's too far of a stretch to read that to mean if there had been a collateral attack on an NJDEP decision or if plaintiffs had sought a remedy that necessarily conflicted with an agency order, then this would be one of the exceptional cases that calls for primary jurisdiction abstention.

I read that language as saying if you find that there is a collateral attack on a DEP decision or a remedy that conflicts with an agency order, then you would be affirmed upon abstaining from this case, according to what the Third Circuit wrote in *Baykeeper*.

So I have to respectfully disagree with Mr. Epstein's interpretation of that case.

There's one more word there that I think's worth a moment's note.

It doesn't say a collateral attack on a DEP order. It says a collateral attack on a DEP decision. An order and a decision are not the same.

Now, Mr. Epstein's correct that there's been no order that says, Newark, don't distribute water bottles in the Wanaque.

But Ms. Heinzerling told Your Honor that DEP in fact

did make that decision. She told you they considered doing it and made a decision not to. That's a decision.

What they want here today in the PI is a collateral attack on that decision. That's not future speculative conflict. It's right here now in front of us. This language is not hard to interpret.

THE COURT: So let's break that down just a bit. So you are saying that --

And, you know, the problem I have is that I did not necessarily hear -- I took some questioning by DEP counsel or -- by this Court to DEP counsel about what the decision was with respect to Wanaque.

And there wasn't necessarily a decision what has been determined. And in fact, I think I heard the word "premature." Perhaps we're talking about different things.

The premature comment was as it relates to the corrosion control treatment plan, and that has yet to be seen whether that, as for Wanaque, will be approved, as I understand it.

But I did ask whether DEP had monitored the sampling and results, whether they had the information, and whether DEP has not yet -- or has not, rather, extended the bottled water program to Wanaque. That, you would argue, is a decision.

MR. KLEIN: My memory of the exchange between the Court and Ms. Heinzerling was, number one, I enjoyed Your

Honor's cross-examination skills because you were honing in on the exact right point.

And number two, I recall, and the transcript will be the arbiter, but I recall that she eventually confirmed in careful language that indeed DEP had been aware of the possibility or need, had thought about it, and it's not happening at this time. And there was a clear implication that that was not just an accident or coincidence. They decided not to do it.

And this is a collateral attack on that decision. And *Baykeeper* is clear that that's grounds for abstention.

THE COURT: With respect to Mr. Epstein's hypothetical, and if we order bottled water to three individuals and then ordered bottled water to two other individuals, that those -- that those -- those orders are not in conflict, you say what?

MR. KLEIN: I say that that can only be true if that number, two or three, was not chosen carefully by the agency.

Because the assumption behind that, the hypothetical, is that if DEP says you have to do two and NRDC says three, then what DEP meant by two is at least two. And if, in that case, I might agree. At least two and three are compatible.

But two and only two is not compatible with three. And I don't think we have any basis to assume that when EPA or DEP makes a decision like two that they have been sloppy or

that they mean something different than they say.

I think it's fair for the Court to assume when the regulator decides two it's because two is the right number and that they considered possibilities on the high side and the low side.

And if the Court said, no, no, three is better, it'll be the end of the regulator as decision maker on that question.

How does Newark even call the regulator the next day? Because these people who, you know, who are actually the ones in the room making the decisions have to say, The Court's going to decide that. We should call the Court.

THE COURT: What about Mr. Epstein's -- his example of a direct conflict?

MR. KLEIN: His example of a direct -- his example of a direct conflict is one example of a direct conflict.

But this is a direct conflict. It's a direct conflict if DEP and EPA say you don't have to do bottled water in the Wanaque because it's not needed and it could hurt people. It could hurt people by keeping ortho out of their homes if they --

THE COURT: We never heard that from EPA and we never heard that from DEP. What I've gotten, at least I think, is an indication that information was reviewed and decisions were made.

MR. KLEIN: I'm offering it as a hypothetical. Because we did hear Dr. Reiber say that's likely to happen, that people will say, The Court has told me my water's toxic. I'm done with that water.

And if that happens, then that retards the ability of orthophosphate to actually protect that property.

Now, it's not hard to imagine that that same thinking, which was shared by Dr. Giammar, the plaintiffs' own expert, is also shared somewhere in DEP and EPA.

So hypothetically, let's say they decided we don't want to do bottled water in Wanaque because it puts people at risk and there's no need.

That's a regulatory decision. And what the plaintiffs are asking you to do is take that out of their hands.

And that's the last point I want to make here.

Mr. Epstein kept saying that my argument is that the administrative state will fail if the Court acts like a Court.

I don't think the hyperbole is helpful. What I'm actually saying is that if the Court maintains its jurisdiction here and enters injunctions, it is going to materially impair the ability of actual regulatory agencies in this case to do their jobs and that that will have consequences for the people of Newark.

And the example I want to give you, which I think I

garbled a little the first time I tried it, the issue about water having a best-buy date and whether that would be safe.

That got raised. There was briefly a media outcry about it. And within either one or two days, the New Jersey Department of Health had responded by issuing a letter that essentially assured people that the situation was in hand. And that situation got tamped down in that way.

The agency was able to respond so fast because it's an agency. It might not be possible for the Court to respond quite that fast for the next similar issue that pops up. It just --

It's not because there's something wrong with the Court. It's because courts don't function at that speed. You don't have the same resources as the New Jersey Department of Health.

And so when they say that I'm suggesting the administrative state would fail, what I'm actually suggesting is that very useful players in this particular situation -- DEP, New Jersey Department of Health, EPA -- will be impaired in their ability to help the people of Newark if the Court is taking up that space. It's not a hypothetical and it's not an exaggeration. It's a real thing that I think the Court should really grapple with.

THE COURT: Before we end for the day, I don't know if Mr. Epstein wanted to respond.

MR. EPSTEIN: Literally 20 seconds.

THE COURT: All right.

CONTINUED ARGUMENT BY MR. EPSTEIN:

MR. EPSTEIN: I am confident the Court will look at the case law and see that non-existent, hypothetical conflicts are not actual conflicts.

So I'm going to address a different point, which is when counsel referred to a collateral attack on an agency order, what that is talking about in *Baykeeper* is a District of New Mexico case where there was a formal agency proceeding that the plaintiffs participated in.

They went through this whole formal proceeding, and they didn't like the result. And then they tried to appeal it in the guise of bringing a different suit. We obviously don't have anything like that here.

The Court said it was, in New Mexico, an indirect collateral attack on the agency's adjudication. We don't have any such thing here.

THE COURT: I'll take all arguments under advisement. As I've already indicated, I'm going to reserve.

I do want to address, though, something that's come out -- come up in the course of the last two days, and that is a discovery issue that came up.

And, Mr. Klein, I need some explanation as to what happened with respect to the inspection reports on those

gates.

Ms. Woods seemed caught off guard. She indicated she had asked and requested this information and never received it. What happened?

MR. KLEIN: Ms. Woods was right that she asked for it and didn't receive it until the day before yesterday's hearing.

So she was caught off guard in the sense that I told her that I wasn't going to offer it into evidence, and I was in a -- I faced a difficult decision of whether to honor that or give it to Your Honor. And I sort of put it to the Court, I think, and the Court asked for it.

And so I don't blame NRDC for feeling like they haven't had more than a day with that document. So let me say two things about it.

Number one, I wish I had gotten it sooner. It is a document that confirms my witness's testimony 100 percent. So I think that, because of that, there ought to be no implication that it was being hidden from anyone. If I had ever seen that thing, I would have handed it over instantly, triumphantly, this is what happened, and we've been trying to tell you.

That, I think, I hope will count as a little bit of evidence in favor of that this was a good faith error here. And the error, as I know you want me to explain, I am, I

think, constrained into getting into a certain high level of detail, but I will give you the best I can.

We asked for it from our contact in the City who is our person who collected documents internally. I think that the request was somehow lost in translation between us and Mr. Adeem. And I think that his understanding was he failed to understand that we needed it and so didn't hand it over.

He wasn't keeping it back. Again, it was something that just confirmed what he'd been saying.

So there was a miscommunication that meant that I honestly but inaccurately told the plaintiffs that it wasn't -- it didn't exist. That's what I was told by my client. That turned out to not be true, as we only learned two days ago.

And I greatly regret that that happened. That's an error on my part, and I take responsibility for it, and I'm sorry for any prejudice that it caused. And I take my discovery responsibilities very seriously, and I will redouble our efforts to make sure that discovery problems like this do not occur.

THE COURT: Does the plaintiff wish to be heard?

MS. WOODS: Yes, Your Honor.

THE COURT: You may be seated, Mr. Klein.

MS. WOODS: I described the exact situation with the inspection logs yesterday, that there had been a series of

requests and denials since December.

There was a request for production on it, there were a series of exchanges about it, both letters and e-mails, requests for supplementation, and then a specific request asking for these logs recently.

But -- and I understand and appreciate Mr. Klein -- what Mr. Klein said, that it was an honest error. But this is not the only discovery problem that we've had in this case.

We've -- there have been a number of instances where we've requested documents, and there's been times when I've been told that they won't take things to their client, that they won't pass along my request to their clients.

And so I would request -- I think --

We don't want to delay this adjudication. We definitely are prejudiced by this. We didn't have a chance to look at the inspection gate log that was produced the night before the hearing. We didn't have a chance to take depositions on it, look at, you know -- have an expert look at whether it really met the requirements. We barely got a chance to understand what all of the notations mean.

And so I do think that it resulted in prejudice, but we don't want to delay the adjudication here. We don't want to delay things further. But I would request, as the case go forward, that there be a serious discussion about discovery.

We've been asking, time and time again since

December, to get discovery for the rest of the case started. I filed letters on it. And I really would ask that we have a separate conversation about starting that process.

And one last thing on the corrosion control-related documents. We have been -- we were barred from taking most discovery beyond discovery that was specifically related to filter issues, including the number of filters that were handed out and the number of water tests and those types of issues.

And there was, I believe, a call, a telephone conference, where we were told that we don't get any discovery on water quality issues.

So we've -- our hands have been tied in discovery over the last seven months.

THE COURT: I'm looking at a text order from Judge Waldor, and the text order does say: The parties are cautioned that requests in discovery must be targeted and proportional to the needs of the application for a preliminary injunction hearing.

That's what Docket Entry 111 said.

I don't know if there were further orders that bar.

But the preliminary injunction hearing includes likelihood of success. And there were at least some, I think, issues that clearly go to, for example, the designation documents, if they existed or did not exist and if they were

discoverable, that may very well go to the heart of some of the issues we touched upon today during oral argument.

So I am going to confer with Magistrate Judge Waldor to see what's gone on.

I will say I have never --

And I trust our magistrate judges and we work well together, and this is one case where I understand that there's been a lot of activity involved. And it's clearly obvious to me based on the interaction I've had with the parties for the last two weeks.

But with that being said, I have never had a position that -- with motions to dismiss pending, no discovery that -- let me say it the other way.

My general rule on a motion to dismiss is that discovery should be ongoing, no matter whether or not I have ruled on the NTD.

I have only made very limited exceptions when it comes to, you know, issues of qualified immunity, issues that, for example, the Court dealt with counsel to say that there are statute of limitations issues that are clearly in play.

Now, I -- it's not a hard and fast rule, to say the least. But it is generally a rule that I have been guided by since my elevation in 2011.

So I'll hear you now, Mr. Klein, and I'll let Ms. Woods respond.

I don't know what Judge Waldor limited the parties to. But to me, needs of the application for a preliminary injunction hearing is general enough that there could have been other information sought outside the filter program.

MR. KLEIN: So, Your Honor --

THE COURT: But this was litigated, I take it?

MR. KLEIN: One gentle word in defense of Judge Waldor. The constraint or the impediment was not that a motion to dismiss was pending. The impediment was that we were heavy duty in preliminary injunction discovery all -- for months and months. You know, that went on with a final discovery close date, I think, in mid January for a briefing deadline of theirs in February.

It ended up continuing on past that because, even after their brief was filed, they convinced Judge Waldor to order further discovery.

So I want to say that in the federal rules that it allows 25 interrogatories and 25 document requests. We're there. They've served that many. We've done -- they've done two 30(b)(6) depositions, one each of the City and the State.

So it's not that discovery wasn't happening. It's that we had our hands full with the preliminary injunction discovery.

And she limited the merits discovery not because there was a motion to dismiss but because we had all we could

handle just getting ready for this hearing and the briefs.

THE COURT: And let's all not forget, the bulk of the original -- the bulk of the motion for preliminary injunction that was filed in February was the filter program. That was the bulk.

MR. KLEIN: That's why the discovery centered on that, but it wasn't exclusively limited to it.

THE COURT: So, you know, in fairness, I'm not -- and I'm not --

I don't want any of my words to be interpreted that I am somehow criticizing Judge Waldor's management of the discovery in this case. I am not.

But I am just saying that I am trying to understand, when I hear that the plaintiff wasn't permitted certain access of discovery that now has come up in our hearing, I'm just wondering why that happened, if indeed it is implicated in Factor 1.

MR. KLEIN: Well, I think that the problem was that the argument made to Judge Waldor by NRDC was an element of likelihood of success -- a preliminary injunction's likelihood of success on the merits. And in order to deal with that, we have to have all discovery in this case done before the preliminary injunction.

Well, that's not a crazy argument, but that can't be completely right because we can't get all the discovery in

this case done before a preliminary injunction.

THE COURT: That's true.

MR. KLEIN: And so Judge Waldor's view on that was that's too much. We've got enough else going on. And that's where we left her.

THE COURT: Okay.

MS. WOODS: Your Honor, I'm sorry, but that is not what we were asking for. We asked to commence discovery. We never -- our briefing was due in February. We were asking to commence discovery after our briefing was due.

We just wanted to get started with the case. It's been -- you know, we filed the case in June 2018. We were ready to get started. We were not trying to get all of the discovery in the case by February.

And just to make clear, we did take two 30(b)(6) depositions, but we were barred from asking any questions about corrosion control treatment in that deposition. It was only on the filter program, I believe.

MR. KLEIN: Because that was expertise. That's a question of expertise. That's a question for an expert.

MS. WOODS: And there's many, many more examples of those. And I would like the opportunity to describe them.

THE COURT: Today?

MS. WOODS: No, no. In a brief or a letter.

THE COURT: No, no. Let's do this. I need to rule.

And so I'm going to take everything under advisement, and I'm going to rule on the current preliminary injunction before me, which is Wanaque only. All right?

In the meantime, can anyone enlighten me on how long this investigation into the filtration devices, how long is this going to take?

MR. KLEIN: I believe Mr. Adeem testified yesterday that it's unknown yet how long it will take, and I don't have different information now.

What I can tell you is CDM Smith and individuals from the regulatory agencies are involved in trying to get that question answered. And honestly, I think they're the right ones to do that. I don't think we can gainsay their decision.

THE COURT: I'm just trying to understand where I'm headed.

I've been asked by Ms. Woods yesterday to set the second phase of the preliminary injunction as it relates to the filters in 45 days. I don't want, necessarily, to set a date without knowing if there's some kind of timeline that the City is operating under or the DEP or --

MS. HEINZERLING: Nothing has been finalized.

THE COURT: Nothing's been finalized.

MR. KLEIN: Can I offer to update the Court at the moment that we understand that that date has been set?

I will write the Court a letter saying, you know, the

regulators and Newark have determined that the filter testing plan will last X days and be completed by X date. And the Court will be updated when that decision gets made.

THE COURT: I obviously need some heads-up because, as you all know, we're operating without six active district judges in our district. We are also, regrettably and sadly, we've lost two of our senior judges within a week of each other, very active senior judges.

And, you know, we are headed towards a judicial crisis in our district because there is no help in sight. And we also have a U.S. attorney who is very aggressively prosecuting cases, which has increased our criminal docket. I would say doubled it.

So I have criminal trials set and I have matters that are already taking me into December. I need to know how much time if I'm going to set aside for the PI as it relates to the filter program.

Because this was two full days. We are now at -- you know, and I don't mind. But we're at two full days on Wanaque, which was a sliver of the preliminary injunction motion that was originally filed in February. A sliver.

Not that it's not important. Wanaque is very important to everyone involved. But it was not the bulk of what was focused on in both discovery and briefing in this case. So I need to get myself ready for what promises to be a

lengthy hearing.

Ms. Woods.

MS. WOODS: Yes, Your Honor. We'd ask that you set that date because of your busy schedule and the docket here in this Court. And as we discussed yesterday, if there is an update, then you could lift the date from the calendar.

And that would ensure that the parties can get here as soon as possible. If a study takes additional time, we can set the date a little further back. But that ensures that there's not a gap.

And I'm really concerned that if we don't have a date on the calendar, there's going to be a gap between when the study comes out and when our preliminary injunction gets adjudicated.

MR. KLEIN: And just to be clear, that will be a hearing about how, somehow, we can reconcile a court order on bottled water with what DEP has on bottled water in the Pequannock, which I haven't figured --

THE COURT: Say that again? That will be a hearing about?

MR. KLEIN: It's going to be a hearing where we're going to have to figure out how that doesn't conflict with what DEP is requiring Newark to do.

I still don't have my head wrapped around that, how the Court can order bottled water on certain parameters, and

there are other parameters that the regulators have approved.

But I would think it would make sense at least to wait until the Court knows at least how long the filter study will take before putting a date on the calendar.

THE COURT: I tend to agree. But let me just take that under advisement.

I'll talk it over with Mr. Selecky, my courtroom deputy, and we'll look at what the schedule looks like.

In the meantime, I do think that I'm going to ask Judge Waldor to have a conference with the parties to go over what's next in terms of discovery.

And I think we've spent quite a bit of time on the abstention issue, so I doubt that I would have any further oral argument on abstention or primary jurisdiction past today's oral argument.

So we'll take a look at that brief and do what we can to get a ruling as quickly -- get a ruling out as quickly as we can.

MR. KLEIN: Your Honor, if it helps as an administrative matter, our pending motion to dismiss asks for alternative relief of a dismissal or stay on the grounds of primary jurisdiction.

So there is in fact a motion pending for abstention, so we can now say that that's been argued and briefed. And the Court may wish to decide those two issues in conjunction.

I don't know.

But I would agree with Your Honor that we have argued it sufficiently. We don't need more. And I would like to just note that I consider that a pending motion before the Court.

Although did it get administratively terminated at one point?

THE COURT: No. It's still a pending motion.

Francesca?

MR. KLEIN: I thought possibly that Your Honor had administratively terminated our motion to --

Well, Your Honor and her staff will take a look at that.

THE COURT: We'll look at it. Don't worry. We're going to --

Chief Judge -- Retired Chief Judge Linares was brought up during, Mr. Klein, at some point today.

I would like -- obviously, I am not inclined to engage in any settlement discussions with the parties because of the injunctive nature of the case. And so I'm wondering whether indeed, post my ruling on the current preliminary injunction, whether the parties would be willing to reconvene with Retired Chief Judge Linares for another round of settlement discussions.

I understand the parties got very close, without

understanding the particulars of what was discussed. I do know that there were at least three days?

MR. KLEIN: Three days with him.

THE COURT: Parties were together until 11:00 p.m. one night? I understand working over the weekend. I understand there was efforts to be made to try to resolve this matter.

What do we think of continuing to try? After my ruling, of course.

MR. KLEIN: I think that I'd like to talk about that very seriously with my client. I'm not prepared to answer on their behalf right now, but I'd like to talk about it with them.

MS. WOODS: And, Your Honor, we would be willing to do that if the City thinks that those discussions would be fruitful based on our discussions at that time.

THE COURT: So can you have those discussions with your client?

MR. KLEIN: Yes, Your Honor.

THE COURT: And, obviously, there's a lot to look at in this case.

I think if your client were to just spend some time reviewing the transcripts of not only the hearing yesterday and the testimony yesterday but, of course, colloquy with the parties today during oral argument, there's quite a bit to

consider. And there are risks on both sides.

And I, quite frankly, as I've always said as a magistrate judge for four and a half years and now as a district judge since 2011, more often than not, I believe settlement is in everyone's best interest. And I am strongly encouraging the parties to continue to work towards an amicable resolution in this case.

That being said, I think there is nothing left for us to discuss.

I thank all the attorneys and all the participants for their time and attention and hard work in the last -- I'm not going to say two days. I know the parties have been working around the clock for the last few, if not months, on doing the best job they can. And I appreciate all the effort that has been put into this case.

We're in recess.

MR. KLEIN: Thank you, Judge.

MS. WOODS: Thank you.

THE DEPUTY CLERK: All rise.

(Proceedings concluded at 4:40 p.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/ Mary Jo Monteleone, CCR, CRCR, RPR
Court Reporter

Date: 08/19/2019